

No. 3075

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United States

Circuit Court of Appeals

For the Ninth Circuit. 10

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NORTHWEST AUTO COMPANY, a Corporation,  
Plaintiff in Error,  
vs.  
G. H. HARMON,  
Defendant in Error.

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Transcript of Record.

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Upon Writ of Error to the United States District Court of  
the Western District of Washington, Northern Division.

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FILED  
DEC 7 1917  
F. D. MONTGOMERY  
CLERK



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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Plaintiff in Error,  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*In the District Court of the United States for the  
Western District of Washington, Northern Di-  
vision.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Names and Addresses of Counsel.**

Messrs. KERR & McCORD, Attorneys for Defend-  
ant and Plaintiff in Error,  
1309-16 Hoge Building, Seattle, Washing-  
ton.

J. N. IVEY, Esq., Attorney for Defendant and  
Plaintiff in Error,  
13-9-16, Hoge Building, Seattle, Washing-  
ton.

Messrs. PILES & HALVERSTADT, Attorneys for  
Plaintiff and Defendant in Error,  
Suite 851, Stuart Building, Seattle, Wash-  
ington. [1\*]

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\*Page-number appearing at foot of page of original certified Transcript  
of Record.

*In the Superior Court of the State of Washington,  
in and for King County.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO CO., a Corporation,

Defendant.

### **Complaint.**

Comes now the plaintiff, and for cause of action against the defendant, alleges:

#### I.

That the defendant Northwest Auto Co. is a corporation organized under the laws of the State of Oregon, and is, and was at all times hereinafter mentioned, engaged in the business of buying and selling automobiles in the State of Washington.

#### II.

That on the 17th day of October, 1914, the Harmon Motor Car Company and defendant entered into a contract in writing, a copy of which contract is hereto attached, marked Exhibit "A," and hereby referred to, and by such reference made a part hereof.

#### III.

That the Harmon Motor Car Company, relying upon such contract and believing that said contract would be complied with by defendant, established certain distributing points, equipped a garage and a shop for the care of the cars, employed certain persons to

assist in the sale, distribution and repair of said cars within the territory described in said contract, advertised such cars for sale, and were fully prepared to handle said cars in all respects as required by said contract. [2]

IV.

That the Harmon Motor Car Company has in all respects complied on its part with the terms of said contract, and has on its part performed all things required of it by said contract to be performed.

V.

That the defendant delivered to Harmon Motor Car Company 8 cars, and on the 22d day of February, 1915, without cause and without any fault on the part of this plaintiff, breached the said contract and notified Harmon Motor Car Company in writing that they elected to cancel said contract, a copy of which notice is hereto attached, marked Exhibit "B," and hereby referred to and by such reference made a part hereof, and that defendant has ever since said date refused to deliver any cars to the Harmon Motor Car Company, or comply in any way with the terms of said contract.

VI.

That had the defendant furnished cars to the Harmon Motor Car Company in accordance with its contract, the Harmon Motor Car Company could have sold all of said cars at a profit and could have made a profit on its said shop and garage so established in the sum of \$13,727.10. That by reason of the wrongful cancellation of said contract by the defendant the Harmon Motor Car Company has been damaged, as

aforesaid, in the sum of \$13,727.10.

VII.

That on the 1st day of February, 1916, by written assignment, the Harmon Motor Car Company sold, assigned and transferred to this plaintiff all its right, title and interest in and to all claims of whatsoever kind or nature that it had against this defendant, including this cause of action. [3]

WHEREFORE plaintiff prays that it have judgment against this defendant in the sum of \$13,727.10, together with its costs and disbursements herein.

HALVERSTADT & CLARKE,

Attorneys for Plaintiff.

State of Washington,  
County of King,—ss.

G. M. Harmon, being first duly sworn, on oath deposes and says: I am the plaintiff above named; I have read the foregoing Complaint, know the contents thereof, and believe the same to be true.

G. M. HARMON.

Subscribed and sworn to before me this 1st day of January, 1916.

DALLAS V. HALVERSTADT,

Notary Public in and for the State of Washington,  
Residing at Seattle.

[Endorsed]: Complaint. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. April 7, 1916. Frank L. Crosby, Clerk. By E. M. L., Deputy. [4]

*In the Superior Court of the State of Washington,  
in and for King County.*

No. 114,417.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO CO., a Corporation,

Defendant.

**Summons.**

The State of Washington, to Northwest Auto Co., a Corporation, Defendant:

You are hereby summoned to appear within twenty days after service of this Summons upon you, exclusive of the day of service, and defend the above-entitled action in the above-entitled court, answer the complaint of plaintiff, and serve a copy of your answer upon the undersigned attorneys for plaintiff at their offices below stated, and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint which will be filed with the clerk of said court, a copy of which is herewith served upon you.

HALVERSTADT & CLARKE,

Attorneys for Plaintiff.

Office and Postoffice Address: 405 Hoge Building,  
Seattle, King County, Washington.

Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. April 7, 1916.  
Frank L. Crosby, Clerk. By E. M. L., Deputy. [5]

*In the Superior Court of the State of Washington,  
in and for the County of King.*

No. 114,417.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Petition for Removal.**

To the Honorable Superior Court of the State of  
Washington for King County:

Your petitioner respectfully shows this Honorable Court that the matter and amount in dispute in the above-entitled suit exceeds exclusive of interest and costs the sum or value of Three Thousand Dollars, and that the controversy in said suit is between citizens of different States. That your petitioner, the defendant in the above-entitled action, was at the time of the commencement of said suit and still is a citizen of the State of Oregon, and a resident of the city of Portland, State of Oregon, and a nonresident of the State of Washington and not a citizen of said States; that your petitioner is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, and that its principal place of business is the city of Portland, in said State of Oregon, and that the plaintiff was at the time of the commencement of this action a resident of the county of King, State of Washington, and a citizen of said State.

Your petitioner offers herewith a good and sufficient surety for its entering into the District Court of the United States for the Western District of Washington, Northern Division, within thirty days from the date of the filing of this petition, a [6] certified copy of the record in this suit and for the paying of all costs that may be awarded by the said District Court, if said District Court shall hold that such suit was wrongfully or improperly removed thereto.

Your petitioner alleges that it has a good and meritorious defense in the above-entitled action.

Your petitioner prays this Honorable Court to proceed no further herein except to make an order of removal of its case as required by law and to accept the said surety bond and to cause the record herein to be removed to the District Court of the United States for the Western District of Washington, Northern Division, and it will ever pray.

KERR & McCORD,  
Attorneys for Petitioner. [7]

State of Washington,  
County of King,—ss.

J. A. Kerr, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the defendant in the above-entitled action; that he has read the foregoing petition and knows the contents thereof and believes the same to be true; that he makes this verification for and on behalf of the defendant as its attorney, for the reason that the defendant is a nonresident of the State of Washington,

County of King, wherein affiant resides.

J. A. KERR.

Subscribed and sworn to before me this 15th day of March, A. D. 1916.

[Notarial Seal]

J. N. IVEY,

Notary Public in and for the State of Washington,  
Residing at Seattle.

State of Washington,

County of King,—ss.

This is to certify that on this 15th day of March, A. D. 1916, before me, a notary public in and for the State of Washington, duly commissioned and sworn, personally appeared J. A. Kerr to me known to be one of the attorneys who executed the foregoing petition, and he then and there acknowledged to me that he executed the same for and on behalf of the petitioner Northwest Auto Company, a corporation, as one of its attorneys.

IN WITNESS WHEREOF, I have hereunto set my hand, affixed my official seal, the day and year first above written.

[Notarial Seal]

J. N. IVEY,

Notary Public in and for the State of Washington,  
Residing at Seattle.

Filed in clerk's office, Mar. 15, 1916. W. S. Sickles, Clerk. By O. S. Bruns, Deputy.

Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Apr. 7, 1916. Frank L. Crosby, Clerk. By E. M. L., Deputy. [8]



*In the Superior Court of the State of Washington,  
in and for the County of King.*

No. 114,417.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Bond on Removal.**

KNOW ALL MEN BY THESE PRESENTS:  
That the Northwest Auto Company, a corporation, as principal, and New Amsterdam Casualty Company, a corporation of New York State as surety, are held and firmly bound unto G. M. Harmon, plaintiff, in the penal sum of Five Hundred (\$500.00) Dollars, for the payment of which well and truly to be made unto the said plaintiff, his heirs, representatives and assigns, they bind themselves, their successors or assigns, jointly and severally, firmly by these presents.

Upon condition, nevertheless, that the said Northwest Auto Company, a corporation, has petitioned the Superior Court of the State of Washington, for King County, for the removal of a certain cause therein pending wherein G. M. Harmon is plaintiff and the Northwest Auto Company is defendant, to the District Court of the United States for the Western District of Washington, Northern Division;

Now, therefore, if the said Northwest Auto Company, a corporation, shall enter into the said District

Court of the United States within thirty (30) days from the date of filing of said petition, a certified copy of the record in said suit and shall well and truly pay all costs that may be awarded by said District Court of the United States for the Western District of Washington, [9] Northern Division, if the said District Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void and of no effect; otherwise to remain in full force and effect.

IN WITNESS WHEREOF, the said Northwest Auto Company, a corporation, has caused these presents to be executed and the said Surety Company has caused these presents to be executed by its duly authorized agent this 15th day of March, A. D. 1916.

NORTHWEST AUTO COMPANY, a Corp.

By KERR & McCORD,

Attorneys.

NEW AMSTERDAM CASUALTY COMPANY,

[Corporate Seal] By CARL M. BALLARD,

Its Agent and Attorney in Fact.

Filed in clerk's office, Mar. 15, 1916. W. K. Sickels, Clerk. By O. S. Bruns, Deputy.

Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. April 7, 1916. Frank L. Crosby, Clerk. By E. M. L., Deputy.

*In the Superior Court of the State of Washington,  
in and for the County of King.*

No. 114,417.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Notice of Motion for Removal of Cause.**

To G. M. Harmon, Plaintiff, and to Messrs. Halverstadt & Clarke, His Attorneys:

You and each of you will please take notice that the defendant will on the 18th day of March, A. D. 1916, at the hour of 9:30 A. M., or as soon thereafter as counsel can be heard, move the Court for an order removing the above-entitled cause to the District Court of the United States for the Western District of Washington, Northern Division, in accordance with the petition and bond of the defendant, copy of which is herewith served upon you.

Dated March 15, 1916.

KERR & McCORD,  
Attorneys for Defendant.

Filed in clerk's office, Mar. 15, 1916. W. K. Sickels, Clerk. By O. S. Bruns, Deputy.

Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. April 7, 1916. Frank L. Crosby, Clerk. By E. M. L., Deputy.

*In the Superior Court of the State of Washington  
in and for King County.*

No. 114,417.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Affidavit of D. V. Halverstadt in Support of Motion  
for Removal of Cause.**

State of Washington,  
County of King,—ss.

D. V. Halverstadt, being first duly sworn, on oath deposes and says: I am one of the attorneys for the plaintiff above named, and have been such since the commencement of the above-entitled action. On the 14th day of March, 1910, Kerr & McCord, the attorneys for the defendant, served upon Halverstadt & Clarke, of which I am a member, and who are now and at all the times during the pendency of this action have been the attorneys for the plaintiff, an appearance in the above-entitled action, the original of which is hereto attached, marked Exhibit "A," hereby referred to, and by such reference made a part hereof as fully as though set forth at length herein. That the alleged petition, bond and notice of removal were not served upon by said firm until the 15th day of March, 1916, nor were they filed prior to that time.

This affidavit is made in opposition to the application of the defendant to remove said action to the United States District Court for the Western District of Washington, Northern Division.

D. V. HALVERSTADT.

Subscribed and sworn to before me this 16th day of March, 1916.

FRED G. CLARKE,

Notary Public in and for the State of Washington,  
Residing at Seattle.

Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. April 7, 1916. Frank L. Crosby, Clerk. By E. M. L. Deputy.  
[12]

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Recd. 3/13/16.

*In the Superior Court of the State of Washington  
in and for the County of King.*

No. ———.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Notice of Appearance.**

To Halverstadt & Clarke, Attorneys for Plaintiff.

PLEASE TAKE NOTICE that the undersigned hereby enter their appearance for the defendant above named.

KERR & McCORD,  
Attorneys for Defendant

Copy of within — received and due service thereof acknowledged this 17th day of March, 1916.

KERR & McCORD,

Attorneys for —.

Filed in clerk's office Mar. 18, 1916. W. K. Sickels, Clerk. By F. W. Smith, Deputy.

Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. April 7, 1916. Frank L. Crosby, Clerk. By E. M. L., Deputy.  
[13]

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*In the Superior Court of the State of Washington  
for the County of King.*

No. 114,417.

Saturday, March 18, 1916.

Hon. J. T. RONALD, Judge.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO CO.,

Defendant.

**Order Overruling Objections to Removal of Cause.**

Order of removal to U. S. District Court signed.

Plaintiff's objections to entry of order overruled, and exceptions allowed.

Min. Book No. 1, page 395.

Filed in U. S. District Court, Western Dist. of Washington, Northern Division. April 7, 1916. Frank L. Crosby, Clerk. By E. M. L., Deputy.  
[14]

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*In the Superior Court of the State of Washington  
in and for the County of King.*

No. 114,417.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Order of Removal.**

This matter coming on for hearing on this 18th day of March, A. D. 1916, upon the petition of the above-named defendant, Northwest Auto Company, a corporation, to remove the above-entitled action from this Court to the District Court of the United States for the Western District of Washington, Northern Division, and it appearing to the Court that the above-named defendant has given due and legal notice of the filing of said petition and the bond on removal and the Court having found the said bond to be executed by good and sufficient surety in a sufficient sum and condition in the manner required by law, and it appearing to the Court that due and legal notice that this petition will be presented to this Court at this time was given said plaintiff, and the Court being now fully advised in the law and the facts, it is now

Ordered that the petition on file herein to remove the above-entitled cause from this Court to the District Court of the United States for the Western District of Washington, Northern Division, be, and the same is hereby accepted and the bond on removal on file herein be and the same is hereby approved, and it is further ordered that the clerk of this Court prepare and certify a copy of the record in the above-entitled action for transmission to the said District Court of the United States.

Done in open court this 18th day of March, 1916.

J. T. RONALD,

Judge.

Filed in open court Mar. 18, 1916. W. K. Sickels, Clerk. By G. B. Myers, Deputy.

Filed in the U. S. District Court, Western Dist. of Washington. April 7, 1916. Frank L. Crosby, Clerk. By E. M. L., Deputy. [15]

---

*In the District Court of the United States for the  
Western District of Washington, Northern Division.*

No. 3,310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Answer.**

Comes now the defendant, Northwest Auto Com-



pany, and for answer to the complaint of the plaintiff alleges as follows:

I.

The defendant admits the allegations contained in paragraphs one and two of plaintiff's complaint.

II.

The defendant denies each and every allegation in paragraph three of plaintiff's complaint contained, except that the Harmon Motor Car Company had and maintained a place of business in the City of Seattle.

III.

The defendant denies each and every allegation contained in paragraph four of said complaint.

IV.

Answering paragraph five of said complaint this defendant admits that the Harmon Motor Car Company did purchase a few cars up to the 22d day of February, 1915, not exceeding eight, and denies each and every other and remaining allegation in said paragraph five contained. [17]

V.

Answering paragraph six of said complaint this defendant denies said paragraph and each and every allegation therein contained.

VI.

Answering paragraph seven of said complaint this defendant has neither knowledge nor information sufficient to enable it or its officers to form a belief as to the truth of the allegations therein contained, and therefore denies said paragraph and each and every allegation therein contained.

And in this connection the defendant denies that it is indebted to the plaintiff in the sum of \$13,727.10 or in any other sum or sums whatsoever.

For further answer and by way of a first affirmative defense to the matters and things set forth in plaintiff's complaint, this defendant says:

### I.

That at the time the contract, Exhibit "A" attached to plaintiff's complaint, was made and entered into by and between this answering defendant and Harmon Motor Car Company, the said F. E. Harmon who executed the contract for the Harmon Motor Car Company, as President, represented that the said Harmon Motor Car Company was a corporation, but that afterwards this defendant ascertained the fact to be that the Harmon Motor Car Company was a mere trader's name used by the said F. E. Harmon.

### II.

That it is specifically provided in said written contract, Exhibit "A," that: "3. The seller reserves the right to reapportion this territory at any time during the life of this contract, if, in the opinion of the seller, the dealer is not [18] properly protecting the sale of Reo Cars in all or any part of the above described territory, but shall give at least ten day's notice of such reapportionment."

### III.

That after the said F. E. Harmon, trading as Harmon Motor Car Company, had entered upon the performance of said contract, and in the month of January, 1915, the defendant learned that the said

Harmon was drinking intoxicating liquors in excess, was neglecting the business of his said agency and was so conducting himself and the business of said agency as to bring the Reo Car in disrepute in the city of Seattle and the territory covered by said contract; that on or about February 1st or 2d, 1915, the said Harmon was arrested and lodged in jail in the city of Seattle, charged with "joy-riding" and dishonorable conduct, and that on, to wit, February 2, 1915, the said Harmon wired the defendant's President, F. W. Vogler, as follows: "Will you come to Seattle to-night, am in serious trouble"; that Mr. Vogler came to the city of Seattle and there found the said Harmon lodged in jail, charged with disorderly conduct as aforesaid, and upon visiting his place of business found the plaintiff herein in charge thereof; that plaintiff was then informed by the said Vogler that the contract, Exhibit "A," would be terminated, as by its terms provided; that the plaintiff asserted that she could borrow the necessary money and could herself carry out the terms of the contract, and suggested to the said Vogler that she could borrow from her mother the sum of \$2,000.00 at least, for that purpose; that the said F. W. Vogler ascertained upon inquiry and charges the fact [19] to be that the said F. E. Harmon or Harmon Motor Car Company was wholly without credit or without any means whatever of carrying out and completing said contract; that the said F. E. Harmon had wholly failed to purchase cars, as provided by paragraph eight of said contract and was in default in the payment of the note referred to

in the last paragraph of said contract; that the defendant's president remained in the city of Seattle for some days, during which time the plaintiff herein professed to make an effort to raise the necessary money to satisfy the said Vogler, that she could herself assume and carry out each and every of the terms of said contract, and finally she, on or about February 20, 1915, informed the said Vogler that she was unable to borrow any money or secure the means with which to carry out said contract, and that thereupon the defendant gave notice of the termination of this contract, as set forth in Exhibit "B" attached to the complaint. In this connection the defendant states to the Court that had the plaintiff been able to secure the capital necessary to conduct the business and had she been able to have carried out said contract, this defendant would have been ready and willing to have had the same carried out by her as representing the said Harmon Motor Car Company; that this defendant only terminated said contract when finally informed that neither the plaintiff nor the Harmon Motor Car Company would be able to fulfill the contract or carry it out by its terms or otherwise.

Further answering said complaint and by way of a second affirmative defense to the matters and things therein alleged, defendant respectfully shows the Court: [20]

#### I.

That said contract provided as follows: "It is agreed and understood that the attached contract will only be made good and expire on July 31, 1915,

provided a certain note amounting to twenty-three hundred and ninety-four and 03/100 (\$2,394.03) falling due in thirty (30) days from to-day, is paid promptly on the due date.”

II.

The defendant alleges that neither the said Harmon Motor Car Company nor the said F. E. Harmon paid said note within thirty days or at all, and that the said note was in considerable part long past due and wholly unpaid on, to wit, February 22, 1915, when Exhibit “B,” said notice of termination, was by this defendant served on the Harmon Motor Car Company.

III.

That after the lapse of ten days from the date of the service of said notice of termination, to wit, on or about March 4, 1915, the said contract was terminated and the said territory was by the defendant re-apportioned and assigned to Messrs. Sharp & Leader, automobile dealers in the city of Seattle.

WHEREFORE, having fully answered the complaint of the plaintiff above named, the defendant prays that it be dismissed hence and that it have judgment against the plaintiff for its costs and disbursements herein.

KERR & McCORD,  
Attorneys for Defendant.

Copy of within Answer received and due service of same acknowledged this 3d day of May, 1916.

HALVERSTADT & CLARKE,  
Attorneys for Dft.

[Indorsed]: Answer. Filed in the U. S. Dist. Court, Western Dist. of Washington, Northern Division. May 3, 1916. Frank L. Crosby, Clerk. By E. M. L., Deputy. [21]

---

*In the District Court of the United States, for the  
Western District of Washington, Northern Di-  
vision.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO CO., a Corporation,

Defendant.

**Amended Reply.**

Comes now the plaintiff and for amended reply to the first affirmative defense, in defendant's answer contained, says:

I.

Replying to paragraph 1, plaintiff denies that she has knowledge or information sufficient to form a belief as to each and every allegation therein contained.

II.

Replying to paragraph 3, admits that F. E. Harmon was lodged in jail in the city of Seattle on or about February 1, 1915, admits that said Harmon wired to one F. W. Vogler to come to Seattle, and denies each and every other allegation in said paragraph contained.

Replying to the second affirmative defense in said answer, plaintiff says:

I.

Replying to paragraph 2, plaintiff denies each and every allegation in said paragraph contained.

II.

Replying to paragraph 3, plaintiff admits that defendant canceled the contract between defendant and Harmon Motor Car Company on or about the 4th day of March, 1915, and denies each and every other allegation in said paragraph contained. [22]

And for an affirmative reply, plaintiff alleges:

I.

That the note mentioned and described in the second affirmative defense in said complaint was fully paid, and the payment thereof was accepted by the defendant as payment under said contract, a copy of which is attached to plaintiff's complaint and marked Exhibit "A."

WHEREFORE, plaintiff prays as in her original complaint.

PILES & HALVERSTADT,  
Attorneys for Plaintiff.

State of Washington,  
County of King,—ss.

G. M. Harmon, being first duly sworn, on oath deposes and says: I am the plaintiff above named. I have read the foregoing Amended Reply, know the contents thereof, and believe the same to be true.

[Seal]

G. M. HARMON.

Subscribed and sworn to before me this 18th day of June, 1917.

DALLAS V. HALVERSTADT,  
Notary Public in and for the State of Washington,  
Residing at Seattle.

Copy of within Amended Reply received and service acknowledged this 18th day of June, 1917.

KERR & McCORD,  
Attorneys for Defendant.

[Indorsed]: Amended Reply. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. June 20, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [23]

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*In the District Court of the United States for the  
Western District of Washington.*

No. 3310—L.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO CO., a Corporation,

Defendant.

**Verdict.**

We, the jury in the above-entitled cause, find for the plaintiff, G. M. Harmon, and assess her damages in the sum of \$13,727.10.

J. W. HUPP,  
Foreman.

[Indorsed]: Verdict. Filed in the U. S. District Court, Western Dist., of Washington, Northern Di-



vision, June 26, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [24]

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*In the Superior Court of the State of Washington,  
Western District of Washington, Northern Di-  
vision.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Motion for Extension of Time to File Bill of  
Exceptions.**

Comes now the above-named defendant and move the Court for an order extending the time within which the defendant shall be required to and may file its bill of exceptions herein, and granting to the defendant an extension of said time up to and including thirty days after the ruling of the Court upon defendant's motion for a new trial.

Dated this 3d day of July, 1917.

KERR & McCORD,  
Attorneys for Defendant.

State of Washington,  
County of King,—ss.

J. N. Ivey, being first duly sworn, upon oath deposes and says:

That he is one of the attorneys for the defendant herein; that he has read the foregoing motion, knows the contents thereof and believes the same to be

meritorious and well founded in law. That it has been impossible since the trial of the above-entitled cause to have had prepared a complete bill of exceptions.

J. N. IVEY.

Subscribed and sworn to before me this the 3d day of July, 1917.

J. N. HAMILL,  
Notary Public in and for the State of Washington,  
Residing at Seattle. [25]

Copy of within motion received and due service of same acknowledged this 3d day of July, 1917.

PILES & HALVERSTADT,  
Attorneys for Plaintiff.

[Indorsed]: Motion. Filed in the U. S. District Court, Western Dist. of Washington, July 5, 1917. Frank L. Crosby, Clerk. S. E. Leitch, Deputy. [26]

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*In the District Court of the United States, for the  
Western District of Washington, Northern Di-  
vision.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Order Extending Time for Filing, etc., of Proposed  
Bill of Exceptions.**

This matter coming on regularly upon the motion of the above-named defendant for an order extending the time in which to file a Bill of Exceptions herein, and it appearing to the Court that the plaintiff has consented that sufficient notice of the time and place at which this motion is being presented has been given, and the Court being fully advised in the facts, the law and the premises, now therefore, it is hereby.

ORDERED, ADJUDGED AND DECREED that the time for filing and serving the proposed Bill of Exceptions on behalf of the defendant in the above-entitled action is hereby extended up to and including thirty days after the ruling of this Court upon the defendant's motion for a new trial in the above-entitled action.

Done in open court this 5th day of July, 1917.

JEREMIAH NETERER,

Judge.

The above order is hereby consented to this 5th day of July, 1917.

PILES & HALVERSTADT,

[Indorsed]: Order. Filed in the U. S. District Court, Western Dist. of Washington, July 5, 1917. Frank L. Crosby, Clerk. By S. E. Leitch, Deputy.

[27]

*In the District Court of the United States, for the  
Western District of Washington, Northern Di-  
vision.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Stipulation Re Extension of Time to File Proposed  
Bill of Exceptions.**

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys undersigned, that that certain motion for an order extending the time within which defendant may file and serve its proposed bill of exceptions, a copy of which motion has been received by plaintiff's attorneys, may be taken up for hearing at any time and place that the defendant may find the Honorable Judge Jeremiah Neterer, without further notice to plaintiff, provided, of course, said motion is taken up within ten days from the 26th day of June, 1917.

Dated July 5, 1917.

PILES & HALVERSTADT,

Attorneys for Plaintiff.

KERR & McLEOD,

Attorneys for Defendants.

[Indorsed]: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington, July 5,

1917. Frank L. Crosby, Clerk. By S. E. Leitch,  
Deputy. [28]

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*In the District Court of the United States, for the  
Western District of Washington, Northern Di-  
vision.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Motion for Judgment Non Obstante and in the  
Alternative for a New Trial.**

Comes now the above-named defendant and moves the Court for a judgment in its favor notwithstanding the verdict of the jury, upon the ground and for the reason that the evidence introduced at the trial of said cause shows affirmatively that the plaintiff is not entitled to recover.

And in the alternative and in the event the Court should not grant the defendant's motion for judgment *non obstante*, then the defendant moves the Court for an order setting aside the verdict of the jury and granting it a new trial upon the following grounds and for the following reasons:

I.

Excessive damages appearing to have been given under the influence of passion and prejudice.

II.

Insufficiency of the evidence to justify the verdict.

## III.

Error of law occurring at the trial. [29]

The evidence shows that if the automobiles which the Harmon Motor Car Company claims to have sold had been delivered to the Harmon Motor Car Company at the time and in the manner specified by the contract had between this company and the defendant company, the only profits that would have been made on the cars thus claimed to have been sold would aggregate about ten to eleven hundred dollars, and that the profits that the Harmon Motor Car Company could reasonably have expected to make on the cars that it had not sold at the time the contract in question was cancelled would not have exceeded under any circumstances two or three thousand dollars.

The same state of facts shows an insufficiency of evidence to justify the verdict, and in addition thereto there was not sufficient evidence to justify the jury in finding that the cars that the plaintiff claims had been sold by the Harmon Motor Car Company had not in fact been sold, except possibly three of the same, and there was no evidence to justify the jury in finding the Harmon Motor Car Company could have sold the balance of the cars which it had contracted to receive from the defendant company.

Among the errors of law that occurred at the time of the trial of this action, there were the following:

(a) The refusal of the Court to grant defendant's motion for a nonsuit.

(b) Refusal of the Court to permit the defendant to prove by the witness Burke that the contract the plaintiff claimed the Harmon Motor Car Company had with the Burke Motor Car Company was in fact an enforceable contract, and in excluding the testimony of the witness Burke when the defendant undertook to prove by the said Burke that the contract that his company had with the Harmon Motor Car Company was and had been cancelled by Burke for good and sufficient reason. [30]

(c) The refusal of the Court to permit the defendant to prove by the witness Sands that the maximum profits that were made by dealers in automobiles in and about the city of Seattle for the past few years was about three per cent on the gross value of the business handled by such concerns.

(d) Failure of the Court to give defendant's proposed instruction No. 1.

(e) Failure of the Court to give defendant's proposed instruction No. 2.

(f) Failure of the Court to give defendant's proposed instruction No. 3.

(g) Failure of the Court to give defendant's proposed instruction No. 4.

(h) Failure of the Court to give defendant's proposed instruction No. 5.

(i) Failure of the Court to give defendant's proposed instruction No. 6.

(j) Failure of the Court to give defendant's proposed instruction No. 7.

(k) The giving by the Court of that instruction which reads as follows:

“The defendant could not simply move arbitrarily and simply take from the plaintiff the benefit which had already accrued and earned without compensating the plaintiff for such earning already made and practically terminated. In other words, the defendant could not under the terms of this contract cancel the contract after the plaintiff had sold a number of automobiles and had earned the money by reason of the provisions of the terms of this contract without compensating the plaintiff for the earnings already made, etc.”

which instruction was the substance of and related to the subject matter contained in plaintiff's proposed instruction No. 2.

(1) The giving of the instruction, which is as follows:

“You are also instructed that the plaintiff would be entitled to recover for such sales as could have been made during the life of the contract, if the cars had been furnished, if you find from the evidence that it was reasonably certain that the sales [31] could have been made and the profits could have been earned, but such profits from such sales must appear from the testimony to have been reasonably certain, etc.”

which said instruction ends with the clause “from that consideration,” and which said instruction was the substance of and covered the subject-matter referred to in plaintiff's instruction No. 3.



(m) The giving of the instruction that reads as follows:

“You are further instructed that the fact that this note attached to this contract provides that if the note was not paid within a given time that the contract should end, that under the testimony disclosed in this case that provision of the note is waived \* \* \* and the Harmon Motor Car Company, or the plaintiff in this case, as the successor in interest of the Harmon Motor Car Company, would have been entitled to reasonable notice and demand for the payment and afforded an opportunity of meeting the terms before being cut off in an arbitrary way,”

this being the substance of the matter referred to in plaintiff's proposed instruction No. 7.

(n) The giving of the instruction with reference to the defendant having assigned one reason at the time of giving notice of cancellation of the contract, and having urged another at the time of the trial, which instruction was the substance of plaintiff's proposed instruction No. 5.

KERR & McCORD,  
Attorneys for Defendant.

State of Washington,  
County of King,—ss.

J. N. Ivey, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the defendant in the above-entitled cause; that he has read the foregoing motion, knows the contents

thereof and believes the same to be meritorious and well founded in law.

J. N. IVEY.

Subscribed and sworn to before me this 6th day of July, A. D. 1917.

[Seal]

J. N. HAMILL,

Notary Public in and for the State of Washington,  
Residing at Seattle. [32]

[Indorsed]: Motion for Judgment *Non Obstante* and in the Alternative for New Trial. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, July 6, 1917. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [33]

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*In the District Court of the United States, for the  
Western District of Washington, Northern Di-  
vision.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Receipt of Copy of Motion for Judgment Non  
Obstante, etc.**

Receipt of motion for judgment *non obstante* and in the alternative for a new trial in the above-

entitled cause is hereby acknowledged on this 6th day of July, A. D. 1917.

PILES & HALVERSTADT,  
MILLER & LYSONS,

Attorneys for Plaintiff.

[Indorsed]: Acknowledgment of Service of Motion for Judgment Non Obstante and in the Alternative for a new Trial. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, July 23, 1917. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [34]

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*United States District Court, Western District of  
Washington, Northern Division.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Opinion on Motion for Retrial.**

Filed August 4, 1917.

PILES & HALVERSTADT, for Plaintiff.

KERR & McCORD, for Defendant.

NETERER, District Judge:

The issues in this case were submitted to a jury, and a verdict returned by the jury in favor of the plaintiff. The defendant has moved for a new trial on various grounds. I have examined the record, and while the verdict may not be such a verdict as

the Court would return if submitted to it, yet the issues, I think, were fairly submitted to the jury. The jury has concluded with relation to the fact, and no error of law occurring upon the trial, the motion for new trial must be denied.

JEREMIAH NETERER,

Judge.

[Indorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Aug. 4, 1917. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [35]

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*United States District Court, Western District of  
Washington, Northern Division.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Remission from Verdict.**

Comes now, G. M. Harmon, the plaintiff above named, and hereby remits from the verdict in the above-entitled action the sum of \$983.95, and hereby agrees to accept, and does accept, a judgment on said verdict in the sum of \$12,743.15, and does hereby agree that when the same is paid it shall be in full payment and settlement of the cause of action in the above-entitled cause.

IN WITNESS WHEREOF, I have hereunto set my hand this 21st day of July, 1917.

G. M. HARMON,  
Plaintiff.

State of Washington,  
County of King,—ss.

This is to certify that on this 21st day of July, 1917, before me, the undersigned, a notary public in and for the State of Washington, duly commissioned, sworn and qualified, personally appeared G. M. Harmon, to me personally known to be the individual named in and who signed the foregoing instrument, and acknowledged to me that she signed and sealed the same as her free and voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and notarial seal, this the day and year in this certificate first above written. [36]

[Seal] DALLAS V. HALVERSTADT,  
Notary Public in and for the State of Washington,  
Residing at Seattle.

[Indorsed]: Remission of Verdict. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Aug. 9, 1917. Frank L. Crosby, Clerk. By —————, Deputy. [37]

*United States District Court, Western District of  
Washington, Northern Division.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Order Denying Motion for Judgment Non Obstante  
Veredicto for New Trial.**

This cause came on to be heard upon the motion of defendant for judgment *non obstante veredicto* and for a new trial, for reasons set forth in said motions, and was argued by counsel and submitted to the Court, and the Court being fully advised in the premises:

It is **HEREBY ORDERED, ADJUDGED AND DECREED** that said motions are, and each of them is, hereby denied, to which ruling of the Court the said defendant by its attorneys excepts.

Done in open court this 1st day of September, 1917.

JEREMIAH NETERER,

Judge.

Copy of within Order received and service acknowledged this 21st day of August, 1917.

KERR & McCORD,

Attorneys for Defendant.

[Indorsed]: Order Denying Motion for Judgment *Non Obstante Veredicto* for New Trial. Filed in the U. S. District Court, Western Dist. of Washing-

ton, Northern Division. Sep. 1, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [38]

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*United States District Court, Western District of  
Washington, Northern Division.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Judgment.**

This cause came on for trial before the Court and a jury on the 21st day of June, 1917, the plaintiff appearing in person, and by Piles & Halverstadt, and Miller & Lyson, her attorneys, the defendant appearing by its officers and by Kerr & McCord, and J. M. Ivey, its attorneys, and testimony in evidence on behalf of the parties having been offered and received by the Court, and said cause having been submitted to the jury under instructions of the Court, and said jury having returned a verdict in favor of the plaintiff in the sum of \$13,727.10, and the plaintiff having duly remitted from said verdict the sum of \$983.95, and the Court being fully advised in the premises;

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff, G. M. Harmon, do have and recover from the Northwest Auto Company, a corporation, defendant above named, the sum of \$12,743.15, together with her costs and disbursements herein taxed at the sum of \$———, with in-

terest thereon at the rate of 6% per annum until paid, to which the defendant excepts and exception is allowed.

Done in open court this 1st day of September, 1917.

JEREMIAH NETERER,

Judge.

Copy of the within judgment received and service acknowledged this 21st day of August, 1917,

KERR & McCORD,

Attorneys for Defendant.

[Indorsed]: Judgment. Filed in the U. S. District Court, Western District of Washington, Northern Division. Sep. 1, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [39]

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*In the District Court of the United States for the  
Western District of Washington, Northern Division.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Order Re Bill of Exceptions.**

This matter having come on regularly for hearing on this the 24th day of September, 1917, upon application of the respective parties to have the bill of exceptions herein settled, and both parties having duly received notice of the time and place for the



settling of the same, and it appearing to the Court that the defendant's proposed bill of exceptions was filed and served within the time heretofore granted the defendant within which to file and serve and the same, and it further appearing to the Court that the plaintiff's proposed amendments to the said bill of exceptions were duly served and filed and that the said amendments should be allowed, it is now by the Court:

ORDERED that the defendant incorporate in its proposed bill of exceptions the said proposed amendments of the plaintiff and that the bill of exceptions thus enlarged shall be and constitute the bill of exceptions in the above-entitled cause, and that the same thus enlarged shall be presented to this Court on the 28th day of September, 1917, at 2 o'clock P. M. for the purpose of certifying the same as such, and the time within which the same shall be certified as such is hereby extended up to and including the said 28th day of September, 1917.

Done in open court this 24th day of September 1917.

JEREMIAH NETERER,  
Judge. [40]

[Indorsed]: Order. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Sept. 24, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [41]

*In the District Court of the United States for  
the Western District of Washington, Northern  
Division.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Stipulation Re Bill of Exceptions.**

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys undersigned:

1st. That the defendant's proposed bill of exceptions was duly served and filed within the time provided by law and the extension thereof hereinbefore provided for, and that the plaintiff's proposed amendments to said bill of exceptions were duly and regularly served and filed within the time provided by law, and the extension hereinbefore provided for.

2d. It is further stipulated and agreed by and between the parties hereto that due notice was given to both parties that the Court would take up the matter of settlement of said bill of exceptions at the hour of two o'clock P. M. on the 24th day of September, 1917, and that the time within which the defendant shall have to enlarge the said bill of exceptions and have the same certified may be extended up to and including the 28th day of September, 1917, and that without further notice to either of the said parties, the same may be taken up by the Court at

two o'clock P. M. on the 28th day of September, 1917, for the purpose of having the same certified.

Dated this 10th day of September, 1917.

PILES & HALVERSTADT,  
Attorneys for Plaintiff.

KERR & McCORD,  
Attorneys for Defendant. [42]

[Indorsed]: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Sept. 28. 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [43]

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*In the District Court of the United States for  
the Western District of Washington, Northern  
Division.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Order Settling and Certifying Bill of Exceptions.**

This cause having been brought on regularly before the court this 28th day of September, A. D. 1917, at the hour of two o'clock P. M., upon the application of the parties hereto for the settling and certifying of the bill of exceptions lately filed herein, and the time of filing, settling and certifying said bill of exceptions having been duly extended by order of the Court and by stipulation of the parties until and including this day, and the parties having agreed

together to submit to the Court the proposed bill of exceptions and the proposed amendments thereto, and all of said amendments so far as are proper having been embodied in the said proposed bill of exceptions as originally served and filed by amendments thereof;

Therefore, on motion of Kerr & McCord, attorneys for the above-named defendant, it is ordered that the said proposed bill of exceptions heretofore filed by the defendant in said cause, as the same now stands amended as aforesaid, be and it is hereby settled as the true bill of exceptions in this cause, and the same as such be now here settled accordingly by the undersigned Judge of this court who presided at the trial of this cause, and that the said bill of exceptions when so certified be filed by the clerk. [44]

Done in open court this 28th day of September, A. D. 1917.

JEREMIAH NETERER,

Judge.

Due service of a copy of the above-entitled order and certificate is hereby acknowledged on this 28th day of September, A. D. 1917.

PILES & HALVERSTADT,

Attorneys for Plaintiff.

[Indorsed]: Order Settling and Certifying Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Sep. 28, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [45]

*In the United States District Court for the Western  
District of Washington, Northern Division.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Proceedings Had June 21, 1917, 10 A. M.**

BE IT REMEMBERED that heretofore and on, to wit, June 21, 1917, at the hour of 10:00 o'clock A. M., the above-entitled cause came regularly on for trial in the above court, and before the Honorable Jeremiah Neterer, Judge of said court, and a jury.

The plaintiff appearing in person and by Messrs. Piles & Halverstadt, her attorneys and counsel.

The defendant appearing by J. N. Ivey, Esq., of Messrs. Kerr & McCord, its attorneys and counsel.

And thereupon the following proceedings were had and done, to wit: [50]

Thursday Morning Session, June 21, 1917.

Jury empaneled and sworn to try the case.

**Testimony of Mrs. Gertrude Harmon, in Her Own  
Behalf.**

MRS. GERTRUDE HARMON, the plaintiff, produced as a witness on her own behalf, being first duly sworn, testified as follows:

(Testimony of Mrs. Gertrude Harmon.)

Direct Examination.

(By Mr. HALVERSTADT.)

Q. Your name is Gertrude Harmon?

A. Yes, sir.

Q. You are the plaintiff in this case?

A. Yes, I am.

Q. During the years 1913-14, and up to about the 1st of March, 1915, were you connected with any business?

A. I was in the McKenna-Harmon Company and the Harmon Motor Car Company, which was the same company.

Q. What was the McKenna-Harmon Company?

A. Automobile agency.

Q. And what was the Harmon Motor Car Company engaged in?     A. Automobile agency.

Q. What connection did you have with either of them?

A. I was secretary and treasurer of both companies.

Q. Did you devote your time to the business?

A. I devoted all of my time, yes.

Q. In what capacity, merely administrative or executive as well? [51]

A. Well, I took care of the office. Was administrative and executive. I took care of the office and watched the men and did all that end of the work.

Q. Will you speak louder, please?

A. I kept the books, and took care of the office, and watched the men's time, did all that end of the work.

(Testimony of Mrs. Gertrude Harmon.)

Q. Were you fully familiar with the business?

A. Yes, I was.

Q. Now, during what years were you connected with the business in the capacity which you have just mentioned? A. All the time it was in business.

Q. Will you state to the jury just what those years were, when it began and when it terminated?

A. Started in 1912 and up until February,—

Q. What month, 1912?

A. About October, I think it was.

Q. Yes.

A. And up until February, 1915.

Q. Up until February, 1915. Had any sum of money been put in that agency for the purpose of building it up? Answer yes or no first.

A. Yes.

Q. There had. What sum of money, if any, had you contributed to that money for the purpose of establishing that business?

Mr. IVEY.—Object to that, your Honor please, for the reason this defendant knew nothing about what this plaintiff had put in that business, and didn't superintend it, so far as I understand, so it would be immaterial as to how much money this plaintiff had put into that business, I think.

Mr. HALVERSTADT.—I will withdraw that question. Probably [52] that might be objectionable. I will put it this way:

Q. Mrs. Harmon, what amount of money had you put in the McKenna-Harmon Company, or Harmon Motor Car Company, which had been used by it in

(Testimony of Mrs. Gertrude Harmon.)

order to build up an automobile business?

Mr. IVEY.—Your Honor please, I object to that. I don't know what relation exists between these two companies. Did you bring that out, Mr. Halverstadt?

Mr. HALVERSTADT.—I will in just a minute. I will withdraw that question and take this one up:

Q. Mr. Harmon, I believe you said the McKenna-Harmon Company was a corporation?

A. I don't know whether it was or not.

Q. The McKenna-Harmon Company?

A. Yes, the McKenna-Harmon Company was a corporation.

Q. Now, then, do you know what the legal status of the Harmon Motor Company was?

A. No, I don't.

Q. Now, just state to the Court and to the jury why that answer is made; in other words, why the change of name was adopted and what had been done along that line.

A. The McKenna-Harmon Company, Mr. McKenna was with us, and when he left the company we changed the name of the company to the Harmon Motor Car Company, and put the papers in the hands of an attorney to have it incorporated under the change of name, but the papers were never filed, and I didn't know about that until February that it wasn't an incorporation.

Q. February, what year? A. 1915. [53]

Q. Now, see if I understand you. You say as McKenna-Harmon Company you were doing busi-



(Testimony of Mrs. Gertrude Harmon.)

ness as a corporation by the name of McKenna-Harmon Company?   A. Yes.

Q. And then you had the proper proceedings taken for the change of name to Harmon Motor Car Company?   A. Yes.

Q. And the papers were left with an attorney, but were never filed in the office of the Secretary of State?

A. No, the attorney didn't file the papers.

Q. He didn't file the papers. And it is for the reason you say you don't know what the Harmon Motor Car Company was?   A. No.

Q. Whether it was a corporation or partnership?

A. Yes.

Q. Now, did you still continue business under the name of the Harmon Motor Car Company as it had theretofore been conducted by the McKenna-Harmon Company, a corporation?   A. Yes.

Q. Just simply went along?   A. Yes.

Q. Now, I will come back to the question again. What sum of money had been contributed by you to the McKenna-Harmon Company or to the Harmon Motor Car Company for the purpose of building up and establishing a business or agency, used in that endeavor?

Mr. IVEY.—I object to that, if your Honor please, for the same reason. I don't know counsel's object in wanting to introduce that testimony; but if plaintiff has any rights in this action it is by reason not of her having put some [54] money into this business, but by reason of this assignment to her. I call

(Testimony of Mrs. Gertrude Harmon.)

your Honor's attention to the fact that the plaintiff is claiming that the Harmon Motor Car Company had a contract with the defendant, that the defendant breached that contract with the Harmon Motor Car Company, and then that the Harmon Motor Car Company assigned to this plaintiff its rights against the Northwest Motor Company after that; therefore it is wholly immaterial as to whether or not this plaintiff put any money into a company that preceded this one, and it will be prejudicial to us. We knew nothing about that, and it isn't claimed we knew about it. Her rights are predicated, if I understand the pleadings correctly, upon the fact she is an assignee of the Harmon Motor Car Company, and not upon the fact she put some money in this company that failed.

The COURT.—I am inclined to think that the objection at this time is good and should be sustained. It may be that the development of this testimony will show that it should be received.

By Mr. HALVERSTADT.—(Q.) Mrs. Harmon, during the years that you were connected with this company, and I understand you were connected with all of them from their commencement? A. Yes.

Q. During these years what had been done in the way of building up a business for the companies?

A. Why, we had built up a good business.

Q. State what had been done in the way of building that up, what acts had been done by you, or by anyone in charge, tending toward building up an established business. [55]

(Testimony of Mrs. Gertrude Harmon.)

A. We always kept advertising in the paper; we spent a lot of money on advertising. When we sold cars we always tried to make a friend out of the customer; that is, we gave him service, and tried to build up a reputation for ourselves for being a good agency in that respect, and I think we had established ourselves in the people's minds.

Q. Now, at the time this contract was entered into, the one of October 17, 1914, had the Harmon Motor Car Company, or whatever name you were conducting business under, established a place of business in the city of Seattle?

A. Yes, we had a place of business.

Q. Where was it?

A. Corner of Boylston and Pike.

Q. Corner of Boylston Avenue and Pike Street?

A. Yes, sir.

Q. Now, just state to the jury where that is in connection with the automobile retail center of this city. Is it near it or—

A. It is right in the center of the automobile district. I think it is the best corner in town.

Q. On which street did your business face, your building face?

A. Our building faced onto Pike street and sided onto Boylston.

Q. It was on that corner, was it?

A. Yes, sir, on that corner.

Q. Now, was Pike street at that time one of the principal thoroughfares of the city of Seattle?

A. Before Pine street was opened up Pike street

(Testimony of Mrs. Gertrude Harmon.)

was used almost exclusively then.

Q. Then since Pine street has been opened up has Pike street been a much used thoroughfare by automobiles? [56]

A. Pike street is, yes, but I think Pine street is coming into its own now.

Q. Was or was not that place of business an advantageous one for the business in which you were engaged?

Mr. IVEY.—I object to that, your Honor please, as calling for a conclusion.

The COURT.—She may answer.

Mr. HALVERSTADT.—Answer the question.

A. At the time we were in business our corner was considered one of the best, if not the best corner in town for an automobile agency.

Q. Was or was not it conveniently located for the automobile business? A. It was, yes.

Mr. HALVERSTADT.—I offer in evidence Plaintiff's Exhibit "1," which I can state very briefly, so the Court will understand, is an assignment of Frank E. Harmon to the plaintiff of all his rights in this matter whatsoever, and of all his interest in the McKenna-Harmon Company or the Harmon Motor Car Company.

Mr. IVEY.—I haven't had time, if your Honor please, to examine these two instruments.

Mr. HALVERSTADT.—Then I am perfectly willing the Court pass on it a little later. Then I offer in evidence Plaintiff's Exhibit "2," which is an assignment of all these concerns to the plaintiff of

(Testimony of Mrs. Gertrude Harmon.)

any cause of action that they, or any of them, had under this contract which is set up in the pleadings.

Mr. IVEY.—What I am trying to find out, if your Honor please, by the examination of these instruments is whether the [57] plaintiff is now claiming that the Harmon Motor Car Company was a corporation or was a copartnership. It must be kind of a cross here between the two. I would like to know.

Mr. HALVERSTADT.—I will state this, your Honor: We have been able to find only two cases where such a question ever arose, and it so happens that both of them are in this state, and I don't think that any court, or I don't think that anyone at the present time can tell just exactly what the law is in that regard; that is, under the facts which are detailed here, that is, where all the steps are taken for the change of name except the actual filing of the papers. But it seems to be the law that it is immaterial whether they are filed or not so far as concerns the doctrine of being a *de facto* corporation, a *de facto* change. Now, I state frankly I don't know what the rule is, but I can't see how it would make any possible difference to these people at all. These assignments will show an assignment by everybody who had any conceivable right to this cause of action to the plaintiff in whatever capacity they may have acted, or whatever may have been their capacity.

Mr. IVEY.—Well, I anticipate your Honor will permit these two documents to be filed, and, as far as

(Testimony of Mrs. Gertrude Harmon.)

I am concerned, they may be filed for whatever they may be worth.

The COURT.—Admitted.

Mr. IVEY.—Reserving, of course, our objection to them on the ground of their immateriality.

The COURT.—Very well.

Assignments referred to received in evidence, marked Plaintiff's Exhibits "1" and "2" and made a part of the record herein. [58]

Mr. HALVERSTADT.—Now, if your Honor please, I offer in evidence Plaintiff's Exhibit "3," which is the contract between the Harmon Motor Car Company and the Northwest Auto Company, the original contract.

Mr. IVEY.—That is admitted.

Mr. HALVERSTADT.—That is the one attached to the pleadings.

Mr. IVEY.—Yes.

The COURT.—Admitted.

Contract referred to received in evidence, marked Plaintiff's Exhibit "3" and made a part of the record herein.

Mr. HALVERSTADT.—Probably in order to enable the jury to follow this better I better read a few of the clauses in this contract.

(Contract read to the jury.)

Q. Now, Mrs. Harmon, this contract, which is introduced as Plaintiff's Exhibit "3," by whom was that form prepared by the Harmon Motor Car Company or by the Northwest Auto Company, or Mr. Vogler?

(Testimony of Mrs. Gertrude Harmon.)

A. That is a Northwest Auto Company form.

Q. I didn't get the answer?

A. You mean who that contract was printed by and prepared?

Q. Yes, who prepared that? Did the Northwest Auto Company or Harmon Motor Car Company?

A. Northwest Auto Company.

Q. In other words, Mr. Vogler brought it up here?

A. Mr. Harmon was in Portland at the time.

Q. Mr. Harmon went down there? A. Yes.

Q. Now, during the first year that any of these concerns were in business what cars did they sell, what make of cars? [59]

A. We sold the Interstate the first year we were in business.

Q. What was the price at which that car retailed?

A. I think the Interstate sold for twenty-four hundred and fifty the first year.

Q. Now, during the second automobile year that these concerns were in business what cars did they sell?

A. The second year we took on the Reo and the Lozier from Mr. Vogler, and we had the Grant and the Interstate besides.

Q. Now, do you recall how many Reo cars were sold by you people in the second year?

A. The second year we were in business and the first year we had the Reo we sold fifty-six Reos.

Q. And how many other cars did you sell?

Mr. IVEY.—If your Honor please, I think I will have to object to the further examination along these

(Testimony of Mrs. Gertrude Harmon.)

lines. I don't see the materiality of that upon this case.

The COURT.—Oh, I think she may answer. It shows an established business, that is all.

Mr. IVEY.—Exception, your Honor.

By Mr. HALVERSTADT.—(Q.) Do you remember the specific number of other cars that the agency sold?

A. Well, counting four Reo trucks we sold, we sold a hundred and three new cars, hundred and thirty-three new cars.

Q. A hundred and thirty-three during the second year?

A. During the second year we were in business.

Q. You say counting four Reo trucks?

A. Counting four Reo trucks, yes, commercial cars.

Q. Now, what kind of a shop, repair-shop, or service department, did you maintain during the second and the third years? [60]

A. We had a large shop and service department.

Q. How long had the company been established at this place on Pike and Boylston that you mentioned a little while ago, prior to the 22d day of February, 1915?

A. I think about a year and a half or two years.

Q. About how long?

A. I think it would be about a year and a half or two years, but I couldn't be positive.

Q. In other words, were you or were you not established at that place of business permanently?

A. Yes, we were.



(Testimony of Mrs. Gertrude Harmon.)

Q. Now, what kind of a service department and repair department did you have there so far as efficiency is concerned?

A. We had a very good service department and repair department.

Q. Very good service department. Now, does or does not a service department benefit an automobile agency?

A. It is one of the biggest factors in selling cars.

Mr. IVEY.—I think counsel is calling for a lot of conclusions, broad conclusions, to say a service department benefits a garage.

The COURT.—Yes, I think that is a conclusion perhaps.

Mr. HALVERSTADT.—Well, I will get at it this way, then:

Q. Mrs. Harmon, mention the factors which enter into making a successful retail automobile agency.

A. Having the right car,—

Q. Having the right car?

A. And giving the proper service on them so you will make friends out of the people you have already sold so they will bring you more customers. [61]

Q. Now, just state to the jury just exactly what you mean by service.

A. I mean when a man buys an automobile he expects to be able to go to a place and get repair parts, and expects, if something happens to his car, he expects to put it in the garage and have the work done for him properly and as quickly as possible.

Q. Now, go ahead. What other elements? You

(Testimony of Mrs. Gertrude Harmon.)

say having the right car and service. What else?

A. And I think good, live salesmen are another factor.

Q. Now, what practice, if any, was followed by the company in rendering speedy service to anyone wanting it?

A. If anyone put in their car for repairs, why, if we had to keep the men and put on a night shift we did it to get their car out for them if they wanted it.

Mr. IVEY.—Mr. Halverstadt, this is all about that McKenna Company, is it not?

Mr. HALVERSTADT.—It is about before the Harmon Motor Car Company was—it will be a question for the Court to pass on, whether it is a partnership or corporation.

Mr. IVEY.—Yes, but the time you are examining the plaintiff on now is the latter part of 1914?

Mr. HALVERSTADT.—I am asking her about the operation of the company, and what it had done, for the purpose of showing what business it had built up.

Mr. IVEY.—That is, the predecessor's interest of this company?

Mr. HALVERSTADT.—Any of them, and what they were doing, particularly at the time this contract was attempted to be cancelled.

Mr. IVEY.—That is what I thought, your Honor, the counsel [62] was asking the witness about what kind of service they gave some two or three years, or some time prior to the time this contract was entered into. I don't believe that is material.

(Testimony of Mrs. Gertrude Harmon.)

I believe your Honor had a tendency to rule against me on that matter—

The COURT.—I think it should be more about the time of entering into the contract.

Mr. HALVERSTADT.—May I do this, your Honor? May I show what had been the practice from the beginning?

The COURT.—Oh, I hardly think so.

Mr. HALVERSTADT.—That is, that might tend to show here was an established business built up which was catering to and received public approval.

The COURT.—I think you should begin at the point at issue, and then you might go back.

Mr. HALVERSTADT.—Very well.

Q. Then, Mrs. Harmon, at the time of the attempted cancellation of this contract on the 22d day of February, 1915, at that time and during the entire time of the life of this particular contract, what had been the policy of the company in regard to these matters which you are speaking of as making an agency successful?

Mr. IVEY.—Now, your Honor, I doubt very seriously if this witness would be permitted to testify to the policy of her company. Of course she would say the policy of her company was to treat her customers fair.

Mr. HALVERSTADT.—Then I will change the question:

Q. What had your company done during those times in the particulars mentioned? Now, have you any objection to that? [63]

(Testimony of Mrs. Gertrude Harmon.)

Mr. IVEY.—That is a pretty broad question.

The COURT.—Let her answer it.

Mr. HALVERSTADT.—Now, answer the question.

A. We had taken care of anybody we had ever sold a car to.

Q. That is a little general. Just state what you did in the way of rendering service, or any of those things which you mentioned, the speed with which it was gotten out, or anything along that line.

Mr. IVEY.—I think, your Honor please, that is pretty self-serving. I think the witness is called upon to tell this jury “we had a fine concern down there.” Of course she would say that.

Mr. HALVERSTADT.—I am asking what they did, not her opinion of it.

Mr. IVEY.—It would be kind of like asking Mr. Halverstadt what kind of a lawyer he was. He would say he was a good one if he would say anything.

The COURT.—Let’s find out something about the facilities, and then what was actually done, then let the jury determine.

Mr. HALVERSTADT.—All right.

Q. Now, Mrs. Harmon, will you please state to the jury what facilities the company maintained during that time for serving the public, for serving the automobile owning public?

A. We had a well equipped machine shop; we had a very competent repair man.

Q. What else did you have there?

A. In the way of taking care of cars afterwards?

(Testimony of Mrs. Gertrude Harmon.)

Q. In the way of taking care of the automobile owning public? [64]

A. Well, we had a garage and shop. We had—the repair department was upstairs. We kept sometimes eighteen or nineteen men, sometimes not so many. Depend on how much work we had. We always had good men.

Q. What was the character of the work which was turning out of that repair-shop?

A. It was always good. I guess we didn't have any complaint.

Mr. IVEY.—I move to strike that out. I think that is going a little bit too far again.

The COURT.—Oh, it may stand. It is not prejudicial, I think. It is a conclusion of course.

Mr. HALVERSTADT.—Then I will put it this way:

Q. Did you have complaint of the character of work which was done in that repair-shop?

A. You can't be in business without having complaints from some one. I suppose we had a few complaints. But, as a general rule, we had very satisfied people; they always came back to us again.

Q. Now then, was work turned out rapidly there or was it turned out slowly?

A. Turned out as quickly as it could be and be good work.

Q. Was that kind of work continued only in the day-time?

A. If we had work in that ought to be out, the man said he wanted his car, why, we worked the men in

(Testimony of Mrs. Gertrude Harmon.)

the night, or put on another force.

Q. Then whether a man's work was done in the day-time or night depended on his own option, did it?

Mr. IVEY.—I certainly think this is objectionable. I believe if counsel wants to show what the earning capacity of this concern was by producing his books, and show how much they [65] made and how much they paid out, I think that would be material; but I don't believe these little details, detailing ways of handling little things around the shop, has anything to do with the defendant or this defendant has anything to do with that.

The COURT.—You think it has any bearing, Mr. Halverstadt, these details are matters of any concern?

Mr. HALVERSTADT.—Yes, for this reason, your Honor: There will be a claim here for profits, what are known as prospective profits. Under all the authorities we can't simply testify what in our opinion we would have made, but we have to show all the details of the business, show the establishment of the business, what had been done, as furnishing a basis for which the jury or the court may determine whether they are or are not too speculative, and for that reason they are perfectly material.

Mr. IVEY.—Well, I think, if your Honor please, if counsel wants to show what the earnings of the company were prior to this date, that probably would be material.

Mr. HALVERSTADT.—That is only one element that enters into the matter.

(Testimony of Mrs. Gertrude Harmon.)

The COURT.—Read the last question. (Question repeated.) I think the objection should be sustained to that.

Mr. HALVERSTADT.—Exception.

The COURT.—When we have the facilities, and the manner in which we dispatched the business, likewise the way it was received by the public, I think that is about as far as we should go.

By Mr. HALVERSTADT.—(Q.) During the time this contract in [66] suit was in force did you maintain any salesmen?

A. Yes, we had a salesroom.

Q. Whom did you have as permanent salesmen?

A. Had Mr. Minor and Mr. Thornton.

Q. Were they or were they not experienced automobile salesmen? A. Yes, they were.

Q. Were either of them familiar with the business generally of the company?

A. Mr. Minor only handled the sales end of it. Mr. Thornton was familiar with the other end of the business.

Q. He was familiar with all of the business?

A. Yes, I think he was.

Q. Now, Mrs. Harmon, what are the months which are considered, or which in fact are, the months in which automobiles can be sold? What is the automobile season each year what months?

A. It starts about the middle of February and goes on until about the last of June.

Q. Middle of February to the last of June of each year. Are or are not those the months in which the

(Testimony of Mrs. Gertrude Harmon.)

retail sales are principally conducted?

A. They are the months, yes. There is very little—

Q. Now then, prior to that what is necessary to be done by an agency in order to effect sales of an automobile?

A. Well, you have got to advertise, advertise during the winter whether you sell cars or not, and keep your car before the people, and keep up your sales-room in good shape, and your garage in good shape, and get ready for the spring business.

Q. Get ready for the spring business. Now then, at the time, [67] say up to the 1st of February, 1914, had you established any subagencies?

A. February, 1915?

Q. '15, yes.

A. Yes, we had a Mr. Burke at Everett,—

Q. Just simply state the places. In what places had you agencies established?

A. Everett, Snohomish, Skagit, Whatcom,—

Q. I want the towns in which the agencies were established.

A. I thought you wanted the counties that the agencies were contracted for?

Q. Well, go ahead with the counties.

A. Snohomish, Skagit, Whatcom and Clallam. We had an agency, of course, at Kent, but that only covered Kent. That wouldn't take in King County. In King County we wouldn't give an agency.

Mr. HALVERSTADT.—I offer in evidence Plaintiff's Exhibits "4," "5" and "6."



(Testimony of Mrs. Gertrude Harmon.)

Mr. IVEY.—Did the defendant have notice, Mr. Halverstadt, of these contracts being executed?

Mr. HALVERSTADT.—Yes, sir. I have a letter acknowledging receipt of a copy of each of these if you wish to see it.

Mr. IVEY.—I have no objection to them except their immateriality, your Honor, please.

Subagency contracts referred to received in evidence, marked Plaintiff's Exhibits "4," "5" and "6" and made a part of the record herein.

By Mr. HALVERSTADT.—(Q.) Handing you, Mrs. Harmon, instruments which are marked Plaintiff's Exhibits "4," "5" and "6," I will ask you to examine them and see whether those are contracts which you referred to? Are they? [68]

A. Yes, sir.

Q. Now, I notice in one of them—

Mr. IVEY.—Let me see one of them.

By Mr. HALVERSTADT.—(Q.) —the contract which covered Skagit County, Knutzen Bros., that they agree here to buy twelve cars. Did Knutzen Bros. later increase the number of cars which they purchased?

A. Knutzen Bros. then took on, right towards the last,—

Mr. IVEY.—Object to that as immaterial, your Honor please, unless that matter, too, was called to the defendant's attention. I don't know whether Mr. Halverstadt proposes to prove that or not.

Mr. HALVERSTADT.—I don't know whether that was or not.

(Testimony of Mrs. Gertrude Harmon.)

The COURT.—She may answer.

A. Knutzen Bros. afterwards took on Whatcom County, and there was a verbal agreement, there hadn't been a written contract given yet, but a verbal agreement they were to get eight more cars for Whatcom County.

By Mr. HALVERSTADT.—(Q.) Now then, to the twelve they were to get eight more cars for Whatcom County in addition, so that made twenty cars that Knutzen Bros. were purchasing?

A. Yes.

Q. Twenty all told. And Fred C. Poole, of Clallam County, agreed to purchase three?

A. He contracted for three.

Q. And Burke Motor Company, in Snohomish County, agreed to purchase twenty? A. Yes.

Q. Now, had any steps been taken in the way of attempting to establish any other agencies than those you have [69] mentioned which might not have been completed on the 22d day of February, 1915?

A. Mr. Thornton had been to Ellensburg to close up Kittitas County, and had it practically closed at the time the contract was cancelled; in fact, it was closed about a week after that, or very shortly after that, by the new agency.

Q. And how many cars did that involve?

A. They contracted for four cars.

Q. Now, how many cars did the Kent Motor Car Company that you mentioned agree to purchase?

A. Three.

(Testimony of Mrs. Gertrude Harmon.)

Q. Now, in addition to these cars which you have mentioned as going to subagents can you tell me how many other cars you had sold up to the 22d day of February, 1915?

A. We had made deals on or had promise?

Q. No, that had been sold, whether delivered or not. In other words, what was the total number of cars that had been definitely disposed of on the 22d day of February, 1915?

A. We had sold one to a Mr. Cline,—

Q. No, just give me the number.

A. I can't without figuring it over.

Q. You have forgotten the figures? All right, I will prove that otherwise by another witness. Now, what number of cars had the defendant delivered to you up to the 22d day of February, 1915?

A. Nine.

Q. Do you remember approximately the dates of those deliveries and the numbers of each consignment? [70]

A. We had one single car come to us on the 19th of October, a 1914 model was delivered to us on our new contract. We had a carload on the new contract, four Reos, come in about the 20th of January, and another car—

Q. What year?

A. 1915. And another car of Reos, four Reos, came in on—I think it was the 19th of February.

Q. 1915?

A. Two or three days before they cancelled.

Q. You speak of a carload. How many constitute

(Testimony of Mrs. Gertrude Harmon.)

a carload? A. Four.

Q. Now, what was the factory price of those cars, do you recall, the Reo cars, that year?

A. It was ten seventy-five, I think.

Q. Ten seventy-five for the Four. What was the Six? A. Twelve ninety-five, I think.

Q. Well, I will prove those later. Let me see if you have that correct. Let me refresh your recollection. Wasn't the factory price of the Four, that is, the Four-cylinder car, ten fifty?

A. Yes, that was—

Q. And the Six-cylinder car fifteen hundred and twenty-five?

A. Yes, the Four was ten-fifty and sold—

Q. Do you recall what the Six model sold for?

A. Something over fifteen hundred dollars.

Q. Wasn't it fifteen hundred and twenty-five?

A. I couldn't say.

Q. Don't remember the figures. Now, up to the 22d of February, then, you had received just nine cars? A. Yes. [71]

Q. Now, what effort had been made to get more cars from the defendant?

A. Every effort we could. We telephoned and wrote, and telephoned some more.

Q. Were you having any trouble with your sub-agents because of the fact you could not get deliveries?

A. Yes, I was having trouble with both my sub-agents, and my salesmen, too, were complaining about it.

(Testimony of Mrs. Gertrude Harmon.)

Q. Now, where it is impossible to get deliveries of cars is it or is it not possible to sell cars rapidly or easily?

A. No, if you can't promise a man a delivery on a car it is almost impossible to get him to give you his money for the car.

Q. Well, aside from getting his money is it easy or hard to get him to sign a contract for one to be paid for when the car comes?

A. No, I don't think you could get him to sign a contract either if you couldn't tell him when you could give it to him.

Q. In other words, when he wants to buy the car he wants the car?

A. He generally does, yes.

Q. Now, was the defendant advised of the fact that you were having trouble with your subagents because of the fact you couldn't make deliveries to them?

A. I believe he was advised by letter, yes.

Q. When a shipment of automobiles come in how is the bill of lading sent, what do you have to do with the bill of lading, and so on, to get the shipment?

A. There is a draft attached to the bill of lading.

[72]

Q. For what amount?

A. For the amount of the cars themselves.

Q. The draft and bill of lading come to some bank?

A. Yes, it is sent to the bank.

Q. Now, is that the way these cars had theretofore been shipped to you?

(Testimony of Mrs. Gertrude Harmon.)

A. Yes, they were always shipped that way.

Q. And the way these nine you mentioned were shipped to you? A. Yes.

Q. Now, what arrangements had you made for meeting those drafts in the event you needed any money as they might come in?

A. If we needed, didn't have—

Q. Just state what arrangements you had.

A. The Northern Bank & Trust Company took up the bill of lading, and as soon as—we gave them our note for it, and as soon as the cars were sold we paid off the note.

Q. Was that practice one which had been followed prior to this year?

A. Yes, we had that arrangement the year before with them, too.

Q. And had been followed out during the entire year before? A. Yes.

Q. Now, when this shipment of four came in in the latter part of January, 1915, how was that shipment taken care of? A. In the same way.

Q. Was there any delay?

A. It was taken up the same day the cars got in.

Q. They shipped on the 19th of February, 1915. How was that taken care of?

A. The same way. [73]

Q. Was there any delay in taking up that draft?

A. No, there was no delay.

Q. And you say you had an arrangement with the Northern Bank & Trust Company to do the same

(Testimony of Mrs. Gertrude Harmon.)

thing for you whenever you needed it throughout this entire season?

A. Yes, the arrangements had been made.

Q. Now, had you personally made such arrangements? A. Yes, I had.

Q. Had you personally ascertained that you could continue that arrangement yourself?

A. Yes, I had.

Q. That is, after the entire business was turned over to you?

A. Yes, I had been to the bank since then.

Q. Now, when these cars came in what did you do with the first one, the one that come in in October, 1915?

A. We sold that to our agent in Everett.

Q. Now, when the second shipment, when the first shipment of four came in the latter part of January, 1915, what did you have to do with those cars?

A. Well, we gave one of them to the agent at Everett, and one to the agent at Burlington—that is Skagit County—the other two I think we sold in Seattle.

Q. Now, then, the second shipment of four, coming in about the 19th of February, 1914, what did you have to do with those?

A. Two of those went to agents and the other two were sold at retail.

Q. Now, then, during—

Mr. IVEY.—I didn't get that.

A. Two of those went to agents and the other two were sold [74] at retail.

(Testimony of Mrs. Gertrude Harmon.)

By Mr. HALVERSTADT.—(Q.) Now, then, during this period, say up to the 19th of February, had your agents, had or had not your agents and salesmen been demanding cars?

A. They had, yes.

Q. And were you able to furnish them to them?

A. No, I wasn't, because I didn't have them.

Q. Why?

A. I hadn't gotten deliveries of them from the Northwest Auto Company.

Q. Now, then, so far as establishing any more subagents in the territory, in view of the fact that you couldn't tell when you could get deliveries could you or could you not have established more subagencies?

A. Well, I think a desirable subagent would probably be—

Mr. IVEY.—I think, your Honor please, that is rather speculative, as to what they could have done.

The COURT.—I think it should be sustained.

Mr. HALVERSTADT.—I beg your pardon?

The COURT.—I think that is rather too speculative.

Mr. HALVERSTADT.—I will put it this way:

Q. If you cannot promise delivery of cars on certain specified dates or months, is or is not it difficult to establish desirable subagencies?

Mr. IVEY.—I think, your Honor, please, it goes without saying if a party couldn't make deliveries they would have difficulty in getting anything going. I don't believe that question—

The COURT.—Sustained. [75]



(Testimony of Mrs. Gertrude Harmon.)

By Mr. HALVERSTADT.—(Q.) Now, up to the 22d of February, 1915, when this contract was attempted to be cancelled, what difficulty, if any, did you have? What was the difficulty, if any, that you had in the way of running the agency?

A. To have something to sell, to have more cars to sell.

Q. In other words,—

A. To get the cars.

Q. To be able to sell something? A. Yes.

Q. Now, Mrs. Harmon, I notice there is attached to this contract, which is marked Plaintiff's Exhibit "3," this memorandum which I read to the jury concerning the payment of this note. Was that note paid? A. Yes, it was paid.

Mr. IVEY.—I think I stated in my statement to the jury that note was paid some time along in March.

Mr. HALVERSTADT.—That isn't the fact. It was paid in partial payments. And I will introduce the whole correspondence file here.

Q. Look through this file of correspondence which I hand you, marked Plaintiff's Exhibit "7," and see if those are letters which are written by the Northwest Auto Company?

Mr. IVEY.—You might have the witness call off the dates of those so I can check off my files. Those are letters from the Northwest Auto Company to the Harmon people, are they?

Mr. HALVERSTADT.—They are letters from the Northwest Auto Company, dated November 4, 1914,

(Testimony of Mrs. Gertrude Harmon.)

November 17, 1914, November 18, 1914, November 23, 1914, November 30, 1914, December 7, 1914, December 9, 1914, January 4, 1915, [76] January 7, 1915, February 24, 1915. And I offer the exhibit in evidence.

Mr. IVEY.—Your Honor, please, we have no objection to it, save to my inspection of it to see if they are all right, and I have no doubt they are.

The COURT.—Admitted.

Mr. HALVERSTADT.—All right, glance through them, if you will.

Mr. IVEY.—We seem to have all except the one of February 24th, but I think that is all right.

Mr. HALVERSTADT.—I offer these letters in evidence.

The COURT.—Admitted.

Mr. HALVERSTADT.—I will read them to the jury. We are withholding for the present the letter of February 24th.

(Reading letters to the jury.)

Letters referred to received in evidence, marked Plaintiff's Exhibit "7" and made a part of the record herein.

Q. Now, Mrs. Harmon, from these letters it appears that on January 4, 1915, there was \$1,194.04 due on that note. Now, what payments, if any, were made on it thereafter?

A. Mr. Vogler accepted a Winton automobile.

Q. About when was this?

A. That was around the first part of February; about the 4th, I should imagine.

(Testimony of Mrs. Gertrude Harmon.)

Q. Of what year?     A. Of 1915.

Q. And where did this take place?

A. In Seattle, up at our agency.

Q. Now, you say he did what?

A. He accepted a Winton automobile we had there as a seven hundred and fifty dollar payment on the note. [77]

Q. Was this Winton car new?

A. No, it was a second-hand one.

Q. Whose suggestion was it that be turned over to him?

A. Mr. Vogler's suggestion. He said he had a place for it.

Q. Said what?

A. Said he didn't have any second-hand cars in Portland and thought he had a place for it.

Q. Now, right at this point let me ask this question: Where was the place of business of the Northwest Auto Company, the defendant?

A. In Portland.

Q. Now, that was an addition payment, then of seven hundred and fifty?     A. Yes.

Q. Now, what funds, if any, belonging to the Harmon Motor Car Company did the Northwest Auto Company have at that time?

A. They had a twelve hundred dollar deposit.

Q. Twelve hundred dollar deposit?     A. Yes.

Q. Although you were required to deposit with them only seven hundred and fifty by the terms of the contract?

A. Yes, they had an excess deposit of \$450.00 that

(Testimony of Mrs. Gertrude Harmon.)

was to take care of the note.

Q. And that excess deposit they had on hand, with the Winton, you say paid the note?

A. Yes, that Winton—when Mr. Vogler accepted the Winton it was understood that cleaned the note up.

Q. Who is Mr. Vogler; what connection has he with the Northwest Auto Company? [78]

A. He is President of the Northwest Auto Company.

Q. Now, were those payments satisfactory to the Northwest Auto Company.

Mr. IVEY.—Object to that as calling for a conclusion, your Honor.

The COURT.—She may answer.

Mr. IVEY.—She can testify to what the facts are.

The COURT.—She may answer.

A. Do you mean the *Winto* car or—

By Mr. HALVERSTADT.—(Q.) Yes, were all of those payments satisfactory?

A. Yes, they told us they were.

Q. And he accepted all of these?

A. Yes.

Q. And made no objection to them that you have heard? A. No, made no objection.

Q. Now, then, about what time do you say it was this Winton was turned over to Mr. Vogler here?

A. It was in the first week of February.

Q. First week of February what year?

A. 1915.

Q. How long was Mr. Vogler in the city of Seattle

(Testimony of Mrs. Gertrude Harmon.)

in the early part of February, 1915, the time you speak of?

A. I imagine it was about a week, but I couldn't tell you exactly.

Q. You can testify to only what you know, Mrs. Harmon. About how long do you know that he was here; that is, from talking to him or seeing him on the street?

A. Well, what I mean is I don't recall the exact number of days he was in town. [79]

Q. Well, give the jury approximately some idea.

A. About a week.

Q. About a week. Now, then, at the time he was here did or did you not lay all the facts concerning you and Mr. Harmon's relations before Mr. Vogler?

A. Yes.

Q. Everything without any reservation?

A. Yes.

Q. What, if anything, did he say to me about cancelling the contract?

A. He didn't say anything to me about cancelling the contract.

Q. Did you ask him whether you might proceed with it as before?

A. I don't think I asked him. I don't believe there was any question came up about the cancellation.

Q. No question came up about it? Did you or did you not advise Mr. Vogler that you had the same arrangement existing at the bank, which you mentioned a moment ago, for the taking up of these drafts and bills of lading?

(Testimony of Mrs. Gertrude Harmon.)

A. He asked me what relation I had at the bank, and how the bank had treated me and was going to treat me, and I told him we had the same arrangement as last year, and the bank had treated me very nice, and was going to continue to do so.

Q. And had that arrangement been made by you at the bank after Mr. Harmon had separated?

A. Yes.

Q. And was the bank advised of the fact you had separated? A. Yes, immediately.

Q. I call your attention to Plaintiff's Exhibit "8" and ask you whose signature that is at the bottom of the letter? [80]

A. That is one—that is Mr. Clark's signature.

Q. Now, what connection has Mr. Clark, if any, with the Northwest Auto Company?

A. I think he is secretary; that is my impression.

Q. That is what?

A. Secretary of the company, I think.

Mr. HALVERSTADT.—We offer in evidence Plaintiff's Exhibit "8."

Mr. IVEY.—I think we admit that, don't we, Mr. Halverstadt, in our pleadings?

Mr. HALVERSTADT.—I am not sure.

The COURT.—Admitted.

Letter of Feb. 22d received in evidence, marked Plaintiff's Exhibit "8," and made a part of the record herein.

By Mr. HALVERSTADT.—(Q.) Did this letter come to you in due course of mail after the date it bears date?

(Testimony of Mrs. Gertrude Harmon.)

A. Yes, it came by registered mail on the 23d of February.

Q. Now, prior to that date had you had any intimation at all that this contract was to be canceled?

A. No, it came as a complete surprise to me.

Q. Speak louder, please.

A. The cancellation came as a complete surprise to me.

Q. And all these payments on the note had been made and accepted by the Northwest Auto Company prior to this date?

A. Prior to the cancellation, yes. The note was entirely taken care of.

Q. Had the interest on the note been kept up theretofore as it was due?

A. The interest was always paid on our "parts" account and was paid with the parts.

Q. And was paid. Calling your attention to an instrument [81] marked Plaintiff's Exhibit "9," I will ask you whose signature that is.

A. Mr. Clark's.

Q. The same man mentioned a moment ago as the secretary? A. Yes.

Mr. HALVERSTADT.—I offer in evidence Plaintiff's Exhibit "9."

Mr. IVEY.—No objection.

The COURT.—Admitted.

Letter of February 22d received in evidence, marked Plaintiff's Exhibit "9," and made a part of the record herein.

(Testimony of Mrs. Gertrude Harmon.)

By Mr. HALVERSTADT.—(Q.) Who was F. C. Poole?

A. He was our agent for Clallam County.

Q. Your subagent, you mean?

A. Well, we were dealers. I guess they were called agents. Yes, they were subagents.

Q. Now, had your other agents been notified?

A. All the agents were notified.

Q. At the same time? A. Yes.

Q. The same time that you were notified?

A. Yes.

Q. After that did the defendant deliver you any more cars? A. After the cancellation?

Q. Yes.

A. I got one more car—not from the defendant. I got it from the new agency, to complete—

Q. Speak a little louder, Mrs. Harmon. Repeat your answer. After the 22d of February did you get any more cars?

A. I got one more car. Not from the defendant, but from the new agency that handled the car in Seattle. I got a [82] car from them to make delivery to a man who had given me his money for a car. That is the only car I got.

Q. What was the name of that new agency?

A. Sharpe & Leader was the men. I think they called themselves the Puget Sound Motor Car Company.

Q. Now, outside of that one additional car could you get delivery of any cars after the 22d of February, 1915? A. No.



(Testimony of Mrs. Gertrude Harmon.)

Q. Were or were not you compelled to return deposits which had been made by others on cars?

A. Yes, we had three other deposits from men we were returning money on because we couldn't make delivery.

Q. Why did you have to return the money to them?

A. We couldn't make delivery of the cars so we had to give them back their money.

Q. Mrs. Harmon, at the time this contract was cancelled could you have secured the agency for another car and prosecuted your business thereafter?

Mr. IVEY.—Object to that, if your Honor please. The witness may answer the question as to whether or not she undertook to do so.

Mr. HALVERSTADT.—This little woman has been engaged in this business for a number of years prior to that, and I want to show by her what situation she was in with reference to getting another agency.

Mr. IVEY.—She can state whether she tried to get another. The question whether she could have—

Mr. HALVERSTADT.—I will withdraw the question.

Q. Was it possible for you, Mrs. Harmon, to get an agency in this territory for another car? [83]

Mr. IVEY.—We object to that, if the Court please, of course. The witness may testify as to whether or not she tried to get one and what the facts were, but what is possible and impossible of course is too broad a question for anybody to try to answer.

(Testimony of Mrs. Gertrude Harmon.)

The COURT.—You *may excused* from the courtroom for a few minutes, gentlemen of the jury.

(Jury retires.)

The COURT.—I don't know that I understand the basis upon which a recovery is predicated, whether it is for loss of profits upon this contract, or injury or damage to business, or recovery of money that was invested because of representations held out by the defendant company. The inquiry, of course, might cover all or any of these so far as the question is concerned, and I thought perhaps we had better find out.

Mr. HALVERSTADT.—The theory is this, your Honor: You will find in consulting the contract, and so on, we have two things coming to us. We have coming to us the amount of money which we had earned by sales up to the time they terminated the contract. Now, the only question there is—the only inquiries are two: How many cars did we sell and how much did we make on each one of them? They have no deduction coming to them whatever because of expense which it cost us to sell those cars; we had paid that and that is none of their business. Further, if we can show the Court or the jury by evidence which the Court believes is not wholly speculative that had the defendant let us go ahead with the sale of these cars and made deliveries to us as he agreed to do, we could [84] during the period from February 22, 1915, to the 31st of July, 1915, the balance of the contract, have disposed of the other cars. Now, we can do that in a number of ways, by showing a number of people we had waiting for cars, the

(Testimony of Mrs. Gertrude Harmon.)

number of machines that were sold, the character of the machine, the improved character of it over any previous year, its standing with other machines, and the excellence of the machine, and everything of that sort. I am not going at this time into the character of evidence that will be introduced, but just illustrating the two character of damages we suffered. First, we are entitled to the money we earned; second, we are entitled to the money we would have earned in carrying out this contract, less the expense we would have incurred in carrying out the contract during the period from the date of its cancellation to the expiration of the contract. Now, that is the theory.

Mr. IVEY.—I assumed, your Honor please, that would be the theory of counsel, but I think the great number of the questions he has been asking were immaterial even upon that theory. Now, for instance, this last question that I objected to I think is improper. He is asking the witness if it was possible for her to get another job.

Mr. HALVERSTADT.—The reason for that is this: You will remember the very familiar rule of law that on breach of contract we must reduce our damages so far as we could. Without any testimony on our part the Court may very well say, "Why, probably you could have gotten another agency."

Mr. IVEY.—I am objecting to that particular question. [85]

Mr. HALVERSTADT.—All right. Now, she didn't make any effort to get an agency for the rea-

(Testimony of Mrs. Gertrude Harmon.)

son she couldn't get one, due to this fact: In the automobile business, the evidence will show, there is a peculiarity in this, that you may have a perfectly good car, as good as any on the market. If that car is not known, why, you can't sell it. In other words, the public are buying automobiles that are known and are standard, and which have been represented here and been built up. In other words, taking on a new agency for a new car which was not known here you would simply be pioneering in the business, and the result would have been that instead of making any money and reducing your damages she would have lost money. Of course, we couldn't recover that from him. That is what I want to introduce this testimony for. There is just one thing else. I want to show further that all of the well-known cars here, all of the cars which are well known in this territory, were represented here, that we couldn't get them. I don't want to be caught in a position where counsel will say, "Why, you should have reduced your damages," and I have got to meet it the only way I can.

Mr. IVEY.—I shall contend, your Honor, they should have made efforts to get another agency. Now, if counsel will attempt to stand by his position he didn't make any effort because he knew he couldn't get any, he would have no evidence along that line. But I still contend if he did take that position it would be improper for your Honor to let that witness testify it would be impossible to get an agency, because we all know none of us can make a statement of that kind truthfully about [86] any-

(Testimony of Mrs. Gertrude Harmon.)

thing of that kind. We don't know what we might get.

The COURT.—Well, I found out just what I wanted to know. We will take a recess until 2:00 o'clock.

Whereupon adjournment was taken until 2:00 o'clock P. M. [87]

Thursday Afternoon Session, June 21, 1917,  
2:00 o'clock P. M.

**Testimony of Mrs. Gertrude Harmon, in Her Own  
Behalf (Resumed).**

Mrs. GERTRUDE HARMON on the stand.

Direct Examination (Resumed).

(Jury recalled.)

(By Mr. HALVERSTADT.)

Q. How many models of Reo cars did the Reo factory make during this season of which we were speaking, that is, this last season you were in business?

A. They made a six-cylinder and four-cylinder model.

Q. That is, two models?

A. Two models, yes.

Q. Now, then, Mrs. Harmon, what kind of a car was the car, so far as desirability, use, efficiency, and things of that sort, were concerned?

A. The Reo was one of the best medium-priced cars on the market.

Q. One of the best medium-priced cars on the market? What other cars, or what cars did you

(Testimony of Mrs. Gertrude Harmon.)

have to sell, did you have most competition with in sale?

A. We had the most competition with the Buick, but we really had a little competition with the Overland and the Studebaker.

Q. Now, then, had you any advantage, from the salesman point of view, in selling the Reo over the Buick?

A. The Buick was about two hundred dollars higher priced [88] than the model we ran in competition with.

Q. In selling cars is the price a material factor?

Mr. IVEY.—Your Honor please, I think that goes without saying it was.

The COURT.—She may answer.

Mr. HALVERSTADT.—Answer the question.

A. Yes, the price is a material factor.

Q. Now,—I don't know whether I asked you this morning or not—about what time was it that medium-priced cars were placed on the market by automobile factories generally?

A. In the year 1915 almost all the automobile factories began placing medium-priced cars on the market and more or less cutting out the higher-priced cars.

Q. Now, what effect, if any, did the reduction in price have on the market in which, that is, the size of the market in which you could sell those cars?

A. It greatly increased the market for automobiles.

Q. Why?

(Testimony of Mrs. Gertrude Harmon.)

A. Because it put the automobile within reach of men. Before they were up against buying either a very cheap or very high-priced car, but when they brought out cars which had good lines, and had electric equipment, electric lights, it made them desirable, and it put them in the reach of people who hadn't thought of automobiles before.

Q. Now, then, was the Reo, were those Reo models the factory manufactured that year, and which you had bought, were they up to date in equipment and so on?

A. Yes, they were in every respect; they were up to the latest models.

Mr. IVEY.—We will admit that the Reo was a pretty good car, [89] Mr. Halverstadt.

By Mr. HALVERSTADT.—(Q.) Now, what year was it that the self-starter and the other comfort-adding devices were introduced in the automobile trade?

A. They started to introduce them in 1913 and '14, but they were more generally placed on all the cars in 1914 and '15; I guess more in 1915.

Q. Was that the year in which they were generally introduced by manufacturers?

A. That is the year they were put on the medium-priced cars. The higher-priced cars started a little before that.

Q. Now, what kind of a car was the Reo, either of these models, in the way of power?

A. It had plenty of power. The Reo was a powerful car, and it stood up well, too.

(Testimony of Mrs. Gertrude Harmon.)

Q. What kind of satisfaction did it give to the purchaser in the way of not getting out of order, things of that sort?

A. The Reo is a very sturdy car and gave good satisfaction to people who bought it.

Q. Mrs. Harmon, I call your attention to a number of letters here, and I will ask you whether those were received by the Harmon Motor Car Company (exhibiting same to witness).

A. Yes, they were.

Q. From whom?

A. From the Northwest Auto Company.

Mr. HALVERSTADT.—I offer those letters in evidence.

Mr. IVEY.—I would like to have Mr. Clark, your Honor please, look them over.

Mr. HALVERSTADT.—As Plaintiff's Exhibit "10." [90]

Mr. IVEY.—I will look them over right now.

By Mr. HALVERSTADT.—(Q.) Now, Mrs. Harmon, speaking now of the model which was sold the previous year, how did the model of the year 1915 compare with the model for the previous year in all these particulars that you have been speaking of?

A. Well, in 1914, the Reo made only a four-cylinder car. In 1915 they came out with a six-cylinder car, and the six, of course, we never got any of those, but their specifications were very good. But the four-cylinder car was more powerful by twenty or twenty-five per cent anyway. It had *better in it*, had a longer wheel base, and was a



(Testimony of Mrs. Gertrude Harmon.)

better car all around than the 1914 car was.

Q. Now, then, speaking of the 1914 cars, did you have any complaint, or what complaint did you have, if any, from purchasers of the 1914 model? What satisfaction did it give?

A. The '14 car gave good satisfaction.

Q. Even that car gave good satisfaction?

A. Yes, gave good satisfaction.

Q. What, *Mr.* Harmon, was the effect on the market for automobiles when the self-starter was put on?

A. The self-starter and the electric lights made it possible for women to drive cars who wouldn't consider cranking a car before or bothering with a presto tank, and it made the automobile a family proposition, where, before, if the man was away at his business all day long and took the car with him his wife wasn't much interested in the car, it was only a Sunday proposition, but after the women started to drive it greatly increased the sale of [91] automobiles.

Q. Did it increase the market of automobiles?

A. It increased the market of automobiles a great deal.

Q. Now, Mrs. Harmon, when this letter of February 22, 1915, came to you, the letter by which they attempted to cancel your contract, did you make any effort to secure another agency?

A. No, I did not.

Q. Why did you not?

A. There was no agency at that time that would have been desirable and would have been a money-maker agency open.

(Testimony of Mrs. Gertrude Harmon.)

Mr. IVEY.—Move to strike that answer, your Honor please, upon the ground it is stating a conclusion. The witness admits she made no attempt to get another agency, and states as a conclusion that there weren't any. If she made no attempt to get one she couldn't possibly know there weren't any. I move to strike that out.

The COURT.—The motion is denied.

By Mr. HALVERSTADT.—(Q.) Suppose this, Mrs. Harmon, suppose at the time you received that letter and the defendant refused to deliver you any Reo automobiles, there had been manufactured a car equally as good in all respects as the Reo, a car of similar price and equally desirable, but which was not known in the territory, the agency included in your contract, could or could not that model have been taken by you at that time with profit?

A. Not the first—

Mr. IVEY.—It is calling for a conclusion, your Honor please.

The COURT.—Overruled.

Mr. HALVERSTADT.—Answer the question.  
[92]

A. There couldn't have been a car then that I could have taken and made money out of the first year I had it if it wasn't well-known car.

Q. Why?

A. I don't care how good an automobile is, if the people don't know it in the section of the country you are selling it in you can't sell that car, if it isn't well known and well advertised in that section.

(Testimony of Mrs. Gertrude Harmon.)

Q. Mrs. Harmon, supposing at the time this letter of February 22d came to you you had attempted to run your plant up there merely as a repair-shop, would that have been possible with profit?

A. The location we had wasn't built for a garage, it was built under our directions for an automobile salesroom, and the main part of the building was given up to our salesroom; it wasn't laid out for a garage and couldn't have been run profitably for a garage.

Q. Mrs. Harmon, I call your attention to an instrument marked Plaintiff's Exhibit "11," and ask you whether this came to the possession of the Harmon Motor Car Company.     A. Yes.

Q. From whom?

A. From the Northwest Auto Company.

Mr. HALVERSTADT.—I offer the instrument in evidence as Plaintiff's Exhibit "11."

Mr. IVEY.—No objection to that exhibit.

The COURT.—Admitted.

Letter of Feb. 15, 1915, received in evidence, marked Plaintiff's Exhibit "11," and made a part of the record herein. [93]

By Mr. HALVERSTADT.—(Q.) Mrs. Harmon, who is Mr. Thornton, mentioned in this letter, "Attention of J. M. Thornton"?

A. He was head salesman, sales manager for me.

Mr. IVEY.—The only objection I have to this Exhibit No. 10 is that it appears to be a lot of circular letters, a good number of which were written

(Testimony of Mrs. Gertrude Harmon.)

prior to the date of this contract. Isn't that correct, Mr. Halverstadt?

Mr. HALVERSTADT.—Only one of them, I think.

Mr. IVEY.—August the 7th?

Mr. HALVERSTADT.—Yes. The contract is dated October 17th.

Mr. IVEY.—This one was written August 7th, I believe.

Mr. HALVERSTADT.—Yes, but it was written with reference to this particular model.

Mr. IVEY.—The others seem to be more or less in the nature of circular letters generally sent out.

Mr. HALVERSTADT.—They are descriptive of the value of this car both from the agency standpoint and from the standpoint of the owner. They are letters from the defendant in this case, and they are clearly admissible, I think.

Mr. IVEY.—I don't know, Mr. Halverstadt, what it is you want to prove by these letters. These letters, I am advised, are circular letters, and they are all about the qualities of this Reo machine, and we don't dispute that that was a good, high-class car for that money. I don't know that that question is at issue here in this case at all; I don't so understand it is. We certainly don't deny it was a good car for the money.

The COURT.—Let them go in.

Mr. IVEY.—Note an exception. [94]

Letters dated Aug. 7, 1914, Nov. 28, 1914, Dec. 8, 1914, Dec. 15, 1914, Jan. 13, 1915, Jan. 23, 1915, Feb.

(Testimony of Mrs. Gertrude Harmon.)

2, 1915, and letter attached dated Spokane, Wash., Oct. 24, 1914, received in evidence, marked Plaintiff's Exhibit "10," and made a part of the record herein.

By Mr. HALVERSTADT.—(Q.) Mrs. Harmon, do you recollect the rate of interest provided—I will ask you this first: Do you know where the note now is which was mentioned in that typewritten slip attached to the contract?

A. It's in Portland now. I think it is in Mr. Vogler's possession. It never was turned over to me.

Q. Was the note ever returned to you that you know of? A. No.

Mr. HALVERSTADT.—Have you the note here, Mr. Ivey?

Mr. IVEY.—No, I don't think I have, Mr. Halverstadt.

By Mr. HALVERSTADT.—(Q.) What rate of interest did that note provide for, if you recollect?

Mr. IVEY.—Isn't it in that complaint? No, it is just referred to, that is right.

A. I think it was eight per cent.

By Mr. HALVERSTADT.—(Q.) Eight per cent. And the interest was paid on the note, was it?

A. Do you mean is it paid now?

Q. Was the interest paid as it came due?

A. The interest was always put on our "Parts" account and paid.

Q. Just explain to the jury what you mean by "parts" account.

A. Well, every month we bought so many Reo

(Testimony of Mrs. Gertrude Harmon.)

parts from the Northwest Auto Company to make our repairs on the cars that we fixed in our garage, and they charged us for whatever they shipped us at the end of the month, and they [95] always put the interest from this note on the "parts" account.

Q. It's the bill for these parts you acquired that you call the "parts" account?

A. It is the bill we got for the parts we used the preceding month.

Mr. HALVERSTADT.—I believe you may cross-examine, Mr. Ivey.

Cross-examination.

(By Mr. IVEY.)

Q. Mrs. Harmon, what was that note given for?

A. For a Lozier automobile.

Q. It is your contention now that that note was fully paid by those partial payments that you mentioned and by a final payment along in March, 1915, is it not?

A. No, my contention is that it was paid in February, before the cancellation of the contract, the note was paid in full.

Q. That \$750.00 that you put up with the company, which is provided for in the contract, that is to say, what I mean by "you," I mean the Harmon Motor Car Company, that \$750.00 was finally used by the Northwest Auto Company in paying the balance of this note, was it not?

A. No, not the \$750.00. That was never touched by the note.

(Testimony of Mrs. Gertrude Harmon.)

Q. Well, then, the Northwest Auto Company still have your \$750.00?

A. The Northwest Auto Company had \$1,200.00. That was \$450.00 more than our deposit was supposed to be.

Q. Yes. Now, if the Northwest Auto Company took that \$450.00 of that twelve hundred and applied that on the note, that wouldn't pay the entire note, would it? [96]

A. Within a few dollars. I think that interest was interest that accrued between the time that Mr. Vogler accepted the Winton—

Q. Well, whatever became, Mrs. Harmon, of that \$750.00 that you put up which was provided for in the contract?

A. Mr. Vogler still has that.

Q. And has never given you credit for it?

A. I don't think he has ever given any credit. I don't know whether he has ever given any credit, but he has never returned it.

Q. Have you your books here in court which show your account, I mean the Harmon Motor Car Company account with the Northwest Auto Company?

A. We have the books, yes.

Q. Which shows that account?

A. Yes.

Q. Are you familiar with those books so that you could find the place and show us how the account stood at any particular time?

A. You see, there was several accounts with the Northwest Auto Company. Was our deposit ac-

(Testimony of Mrs. Gertrude Harmon.)

count, which was kept separate entirely from our car account. That was carried under the account of Reo Car Sales and Reo Car Purchases. You would have to balance up between the two to get that. Our deposit account was always kept separate from any other account.

Q. Have you ever had a balance struck of those accounts so as to see just how much you claim that the Northwest Auto Company owes the Harmon Motor?

A. On the difference between our deposit and—  
[97]

Q. Yes, all around, a balance all together; that is, one account might show you are indebted to the defendant and the other account might show that in that respect it was *vice versa*, and so on; but you knew you could tell from your books at any particular time which of you owed the other money, couldn't you? You could always do that?

A. I could tell whether we were indebted on the parts account if I looked up that. Our deposit account always stood as it was.

Q. Are you absolutely sure, Mrs. Harmon, that that \$750.00, which you say was a part of the \$1,200.00, was not used to pay the balance on that note? Are you sure of that?

A. Absolutely positive.

Q. Yes. Well, now, will you give me just exactly the items that were used to pay that note? We will start off with that note—

A. We paid \$600.00 at two separate times, which made \$1,200.00, our check was given for.



(Testimony of Mrs. Gertrude Harmon.)

Q. Have you the dates of those two six hundred dollar items? One is November 18th?

A. I don't understand, Mr. Ivey.

Q. I say, one of those six hundred dollar items was paid on November 18th, I think, and one on December 9, 1914. Now, those two together would make \$1,200.00. Now, that \$1,200.00 deducted from the \$2,394.00 leaves \$1194.00? A. Yes.

Q. Now, what I want to get you to tell me is this: How is that \$1,194.00 paid?

A. \$750.00 credit on the Winton car that Mr. Vogler took back to Portland with him, and \$450.00 excess deposit. [98]

Q. Four hundred and fifty and seven hundred and fifty would make eleven hundred dollars. That, then, would leave—

A JUROR.—\$1,200.00.

Mr. IVEY.—\$1,200.00.

Q. (Continuing:) That would leave, according to your figures, a balance of six dollars in your favor, provided that all of those items, all of those sums were applied on that note. But now isn't it a fact that on the parts account that you owe the company something like six hundred dollars, that is, the Harmon Motor Car Company?

A. I would have to look at the parts account. It wasn't anywhere near six hundred dollars we owed the Northwest Auto Company for that. We paid each month for the parts we got before, and it never ran up to six hundred dollars a month.

Q. Well, did you ever instruct the company, in

(Testimony of Mrs. Gertrude Harmon.)

writing or otherwise, to make the application of this \$450.00 that you speak of, being the difference between seven hundred and fifty and twelve hundred, on the note?

A. At the time Mr. Harmon signed up the new contract we had seven hundred dollars up with the Northwest Auto Company from the preceding year, which Mr. Volger was holding over our 1914 contract. Mr. Harmon gave him a check for five hundred dollars additional, with the understanding that we was to protect him on this note, and when we had the note paid up, all but this \$450.00, then that was to be applied onto the note and the note released.

Q. Then it is your contention that not only this note has been paid, but the parts account was settled, too?

A. The Parts Account was separate from the note.  
[99]

Q. No, was settled, also; that the parts account you are contending—

A. The Parts Account that accrued during the month of February hasn't been settled with the Northwest Auto Company.

Q. Has been or has not?

A. Has not been settled, no.

Q. Well, was the Parts Account that accrued prior to February, 1915, ever paid?

A. All except an account which the Northwest Auto Company had charged against us, called a Suspense Account on Lozier Parts.

Q. How much was that, do you know?

(Testimony of Mrs. Gertrude Harmon.)

A. I couldn't tell you how much an account that was.

Q. Are you in a position at this time, Mrs. Harmon, or could you by an examination of your books, determine whether or not in about the middle of February, 1915, the Harmon Motor Car Company was indebted to the Northwest Motor Company in the sum of about \$530.00 for parts? Could you determine that from your books, or did you have somebody else manage your books?

A. No, I kept the books.

Q. You did keep them?      A. Yes.

Q. Well, would you testify now positively that you did not owe the company at that time about \$530.00 for parts?      A. On Reo parts?

Q. No, parts of machines generally; not the Suspense Account.

A. Outside of the Suspense Account there would be only Reo parts. I would not say just what the amount was we owed the Northwest Auto Company on Reo parts, but there must [100] have been about three hundred or three hundred and fifty dollars' worth of Reo parts had been sent to the company that were defective on 1914 models, and for which they didn't give us credits, and which we were waiting for credits on the bill.

Q. But you are not certain now, as to whether or not, even if the defendant had allowed those items that you are now claiming, but you are not even then certain but that the Harmon Motor Company would be still owing the defendant about \$530.00?

(Testimony of Mrs. Gertrude Harmon.)

A. They would be still owing about \$250.00 probably.

Q. If those—

A. If the credits had been put through as they should have been.

Q. Did you ever write the defendant company and make a claim for those returned articles that you speak of?     A. The defective parts?

Q. Yes.

A. There certainly will be in the correspondence a letter where we sent the parts back. You don't make any claim on account of returned parts. You return them and send the number of the car they were taken out of, and the company passes on whether they were defective or not, and if they are, they send you the credit for them. There is no claim put through for defective automobile parts.

Q. Then you admit at this time, then, that the Harmon Motor Company was indebted in the sum of at least two or three hundred dollars?

Mr. HALVERSTADT.—Just a minute. Your Honor, I haven't objected to this testimony until this time, but I want [101] to now for this reason: If you will examine this contract, even if you assume what counsel is seeking to draw out is true, it is not an excuse for cancellation of the contract. And further, the contract provides expressly in what contingencies it can be cancelled, and this isn't one of them. Now, they would merely have a right of action for the recovery of that sum, against which at that time they held \$750.00 deposit, which, in the contract, is

(Testimony of Mrs. Gertrude Harmon.)

provided shall be for the faithful performance of the contract. But the contract does not provide, does not contain any provision giving the company, the defendant, the right to cancel that contract if there shall be any overdue bill on this Parts Account, consequently it is utterly immaterial whether the company did or did not owe a couple of hundred dollars for Parts Account, because the defendant here is making no claim for any sum which is due the defendant; in other words, there is no pleading here of a counterclaim, or otherwise, asking for any affirmative judgment against the plaintiff; and I object to the testimony, and I think it is entirely irrelevant and immaterial.

The COURT.—Overruled.

Mr. IVEY.—Read the question, please.

Q. (Question repeated.)

A. Our Parts Account probably would have been that for the month, our February Parts Account, which may have been that sum of money.

Q. Now, did you give the defendant company any instructions as to how to apply this \$450.00? I think you answered that question once, but I have forgotten what your answer was. [102]

A. Yes. At the time that Mr. Vogler received the additional \$500.00 the instructions and idea then was to apply it on the note.

Q. When was that \$500.00 received?

A. That was given to him at the time that the 1915 contract was signed up in October, 1914.

(Testimony of Mrs. Gertrude Harmon.)

Q. That is a part of that twelve hundred you speak of?

A. That is part of the twelve hundred, yes.

Q. And you say it was to be applied on the note?

A. Yes.

Q. Now, when you sent the other two six hundred dollar items down you sent them with a letter, did you?     A. The checks?

Q. Yes.

A. I suppose so. I don't recall that.

Q. And when they wrote you and asked you why you didn't hurry up and pay the note, right at that time you had overpaid the note, hadn't you?

A. No, not until Mr. Vogler accepted the Winton the note wasn't paid; not at the time they wrote me about that.

Q. I see. Now, returning to your testimony in regard to the machines that you had gotten contract for the sale of at the time this contract was cancelled, you said, I believe, that you had gotten nine already from the company?     A. Yes.

Q. All nine of those had been disposed of, I believe you said?     A. Yes.

Q. And how many more machines did you have contracts out for the sale of?

A. Fifty-three all together. [103]

Q. 53?

A. Yes. Oh, more than the nine? I take that back. Fifty-three including the nine.

Q. I did not understand you?

A. I say, fifty-three including the nine.

(Testimony of Mrs. Gertrude Harmon.)

Q. In other words, then, you had contracts out for the sale of forty-four machines? A. Yes.

Q. That were not delivered? A. Yes.

Q. Who were those contracts with?

A. They were with my agents. This Mr. Burke at Everett,—

Q. There were two or three of those contracts, I believe, filed this morning, and those are the three (showing)? A. Yes.

Q. One was the Burke?

A. Burke at Everett, yes.

Q. And the other the Poole contract, and the other of those Knutzen Bros. contract?

A. That is their Skagit County contract.

Q. Yes. Now, when you say that you had contracts out for forty-four you include all of the cars that are mentioned in these three different contracts, I suppose? A. Yes.

Q. I notice in the Snohomish County contract there are two—have you had these up so you know right off what they are?

A. There are twenty on the Snohomish County.

Q. There are twenty on the Snohomish County?

A. Yes; and twelve in Mr. Knutzen's Skagit County contract; and three from Mr. Poole in Clallam County. [104]

Q. That makes thirty-five, doesn't it?

A. Yes.

Q. Now, that leaves nine yet unaccounted for?

A. Mr.— the Knutzen Bros. up at Burlington

(Testimony of Mrs. Gertrude Harmon.)

towards the latter part of February took on Whatcom County with an additional eight cars.

Q. Where is that contract?

A. That wasn't made out yet. At the time the cancellation came it was just agreed upon, there was a verbal agreement between us, but I hadn't put it into a written contract yet.

Q. That would be forty-three. Then one more, isn't there?

A. No, you see you are counting those already delivered to my agents.

Q. I started with fifty-three, I think.

A. You want to get fifty-three?

Q. Yes.

A. Well, I had three retail sales made, a Mr. Wright, a Mr. Cooley,—and who was the other one? I don't recall his name now—Mr. Thornton would know—that I returned their money to them at the time of the cancellation. They were retail sales.

Q. Then there were just about three return sales all together?

A. That I returned the money on, yes.

Q. What I am getting at, you had agreed to sell three on retail, and you couldn't deliver those so you returned the money?

A. I returned the money, yes.

Q. Just on those three?

A. I only returned money on three cars, yes.

[105]

Q. Just three?      A. Yes.

Q. And all of the other sales that you speak of



(Testimony of Mrs. Gertrude Harmon.)

were these agency sales represented by these contracts and that contract that had not yet been signed up? A. Yes, they were agency sales.

Q. Mrs. Harmon, you say that you had been in this business for quite a while, some two or three years prior to the entering into the contract with the defendant company. What did you say the name of your company was before you changed it to Harmon Motor Company?

A. McKenna & Harmon.

Q. Well, I will call it the McKenna Company, then, just for brevity. How many cars did you handle in the McKenna Company, or the Harmon Motor Car Company, either one, per year usually?

A. In 1914 we sold a hundred and thirty-three cars of different makes, new cars. That wasn't counting the old cars.

Q. I see. What was about the average price of those cars, that hundred and thirty-three?

A. The average price—we had the Reo at ten-fifty, or ten-seventy-five, and had the Interstate—there was about twenty Interstates sold that year. There was one for twenty-four fifty and one sold for thirty-five hundred. And then we sold the Lozier that year for Mr. Vogler. We sold them for twenty-two fifty and thirty-two hundred, the Lozier Four and Six. I couldn't tell you exactly, but it was approximately that. Then we sold a little car, the Grant, we sold for between five and six hundred. [106] And Reo trucks. We sold four Reo trucks. They sold for about eighteen hundred.

(Testimony of Mrs. Gertrude Harmon.)

Q. Now, was that the year 1914 and '13?

A. That was 1914.

Q. That was the 1914 season? A. Yes.

Q. When you say a hundred and thirty-three you mean for the entire year of 1914? A. Yes, surely.

Q. What was the financial condition of your company at the beginning of 1914?

A. Before we entered the winter of 1914, you mean, or in January, 1915?

Q. No, I am talking about January, 1914.

A. January, 1914?

Q. Yes, that's right. About what was its financial condition?

A. Heavens, I don't know. I couldn't answer that. It was all right.

Q. Did you have some money ahead at that time?

A. Yes.

Q. You know about how much?

A. No, I couldn't tell you.

Q. Could you tell me generally about how much your assets exceeded your liabilities at that time.

A. In January, 1914?

Q. Yes, just approximately; I don't mean exactly?

A. Oh, probably three or four thousand dollars.

Q. Three or four thousand. And can you tell me now about the relative standing of your assets and liabilities January 1st, 1915? [107]

A. Why, of course our assets were a great deal more.

Q. Your assets were more?

A. In 1915, yes.

(Testimony of Mrs. Gertrude Harmon.)

Q. In what did your assets consist?

A. In machinery and equipment of every kind. We had four or five times as much as we did in 1913; more than that.

Q. Four or five times as much?     A. Yes.

Q. Did you have any ready cash?

A. Yes. Had our bank balance, which we always—

Q. Had a good-sized bank balance?

A. I don't recall the exact amount of our bank balance. It varied a good deal. It does in the automobile business.

Q. You kept a good bank balance right along, did you?     A. Fairly good, yes.

Q. What do you mean by a good bank balance, couple of thousand?

A. In the neighborhood of fifteen hundred or two thousand, yes.

Q. Well, in that case, Mrs. Harmon, why did Mr. Harmon write the company a letter and say that he wasn't able to pay the balance of that note some time along in October or November? There were two letters about that, weren't there?

A. About the six hundred dollars?

Q. Yes. You know there are quite a number of letters here that our company wrote yours saying they would like mighty well to have that note paid up, and you answered by saying that your company—or by saying that you were hard pressed, couldn't make it, isn't that a fact? There are some such letters in there?

(Testimony of Mrs. Gertrude Harmon.)

A. Yes. At the time we did give them six hundred dollars at [108] two different times. Probably at the time we wrote them we didn't happen to have that six hundred in the bank.

Q. Now, will you find in your books, if you can, that part of the books which show the assets and liabilities of your company in 1914? Can you find that for us?

A. I have no account of these assets on the books. That would only come under—for instance, shop equipment would be bought from time to time; as we need something we would buy it.

Q. Your books, then, wouldn't show the net worth of your company at the beginning of 1914?

A. Those books don't show it. They are opened up by another bookkeeper besides me, and there is no account in there that shows side by side the assets and liabilities of the company.

Q. Well, could you now give us the data upon which you based your statement that your company was worth three or four times as much at the beginning of 1915 than it was in the beginning of 1914?

A. Because we had bought that much equipment during the following season.

Q. Your books will show what equipment you bought?

A. They show that we bought, yes.

Q. Could you make us out a statement?

A. I could if you gave me three or four hours to do it. Equipping an automobile garage you buy from a dozen different parties. More than that. You

(Testimony of Mrs. Gertrude Harmon.)

buy your machinery, and your parts, and your tools, and your furniture.

Q. And your books will show those different things?

A. In different accounts. I suppose I could make up a statement. [109]

Q. After your testimony is over we will get you to make such a statement. What I want to get is a statement of the assets and liabilities of the company January 1st, 1914, and a similar statement January 1st, 1915, is what I am trying to get at. Now, you sold a hundred and thirty-three cars, you say, in that year. Do you know, Mrs. Harmon, about what per cent is made by the average dealer in Seattle handling cars on the gross output, what per cent they make?

A. I think he would make about fifteen per cent.

Q. You think he would make about fifteen per cent net? A. Yes.

Q. Now, that is what nearly all of them make about fifteen. Do you know of a single institution in this city that makes a fifteen per cent profit on their volume of business? Can you give me the name of a single one?

Mr. HALVERSTADT.—I object because that is not proper cross-examination. I have not gone into the net returns with her.

Mr. IVEY.—I think it is, if your Honor, please. What we are getting at here, if counsel is undertaking to prove anything at all he is undertaking to prove that they would have made certain profits

(Testimony of Mrs. Gertrude Harmon.)

during that five months. Now, I am trying to reduce this to something concrete so we can all have something to work on. Now, the witness says that at the end of 1915 their assets were four or five times what they were at the beginning. I am asking the witness to fix up that data on that and get it later. But now I don't know how the plaintiff arrived at this [110] thirteen thousand dollar claim. If counsel wants—I will withdraw that question and ask this question:

Q. How do you figure out, Mrs. Harmon, that you have been damaged in the sum of \$13,135.00?

Mr. HALVERSTADT.—Object for the same reason. Mrs. Harmon was asked nothing whatever about figures. Those are matters which were brought out by other witnesses. It is improper cross-examination.

Mr. IVEY.—Well, Mrs. Harmon is bookkeeper, she says.

Mr. HALVERSTADT.—All right, but she wasn't asked about that. She may be a good many things, but that would not justify a cross-examination over matters on which she was not examined in chief.

The COURT.—I think the objection to the question as it is propounded should be sustained.

Mr. IVEY.—I would like an exception, your Honor.

The COURT.—Yes.

By Mr. IVEY.—(Q.) When Mr. Vogler came up here, Mrs. Harmon, you had quite a talk with him about the conduct of your husband, did you not?

(Testimony of Mrs. Gertrude Harmon.)

A. Yes.

Q. When did you say you got a divorce from him?

A. I haven't ever gotten a divorce from him.

Q. I thought you did say you had. Well, he was indulging at that time in a good deal of joy-riding, wasn't he?

A. No, I don't believe he was indulging in joy-riding, not that I know of.

Q. Do you know what he was in jail for that time he sent for Mr. Vogler to come up here and sort of help him out?

A. For being with two other men, yes. [111]

Q. For being with two other men?

A. Do you want me to state the charge?

Q. Yes, that is what I was really trying to get. I don't mind telling you what I am driving at. That I want to show by competent evidence that one of the reasons why Mr. Vogler discharged Mr. Harmon, or why he wanted the contract cancelled, was that Mr. Harmon's conduct was pretty bad then, and it was—I don't know, it isn't a matter of record in this case, what he was charged with, or how he happened to get in jail, and that is what I *ask* asking you about, what he did get in jail for, if you know?

Mr. HALVERSTADT.—If your Honor, please, that involves again a question of cancelling the contract for such cause as that. In the contract, if you will notice it, it is expressly provided upon what contingencies the contract may be cancelled. Now, these aren't any of them. Now, that contract contains a number of different and separate clauses. It is not

(Testimony of Mrs. Gertrude Harmon.)

one entire contract, but it is a contract which has separable clauses.

Mr. IVEY.—I think, if your Honor please, we certainly should be permitted, under this clause with reference to reallottment of territory, to introduce this evidence. Certainly under that, if not on general principles, because your Honor would not hold that as a matter of law we would have to let Mr. Harmon continue acting as our selling agent if he was not conducting himself in such a manner as would *entitled* him to it.

The COURT.—I think that would be a matter of defense. This witness wasn't asking anything about this on direct examination. Counsel did make a statement to the jury. [112]

Mr. IVEY.—As I recall it, your Honor, and the reason I happened to go into it, because Mrs. Harmon said that she told M. Vogler all about the conduct of her husband when he was up here.

The COURT.—Well, you just asked her that, but not on direct.

Mr. IVEY.—That was in answer to Mr. Halverstadt's question. Mr. Halverstadt asked Mrs. Harmon, as I recall it, whether or not when Mr. Vogler came up here, just prior to the time this contract was cancelled, she told Mr. Vogler about Mr. Harmon's conduct, and she said she did.

The COURT.—I didn't recall that.

Mr. HALVERSTADT.—I think probably that is true.

The COURT.—She may answer the question.



(Testimony of Mrs. Gertrude Harmon.)

By Mr. IVEY.—(Q.) Well, you did go into the details, then, with Mr. Vogler about that matter?

A. Mr. Vogler know before he ever talked to me all about it. I think Mr. Vogler saw Mr. Harmon before he ever saw me.

Q. Now, at the time this contract was made did you yourself have anything to do with the making of it? I mean to say, did you see Mr. Vogler or have any talks with him about it?

A. About the 1915 contract?

Q. Yes, about the 1915 contract.

A. I don't recall that I spoke to Mr. Vogler about the 1915 contract. I may have when he was in Seattle. He was in Seattle a good deal at that time.

Q. That contract was signed "Harmon Motor Car Company, by F. E. Harmon"? A. Yes.

Q. "F. E. Harmon, President," it says?

A. Yes, sir, he was president. [113]

Q. That was your husband? A. Yes.

Q. And he was the one who negotiated for this contract?

A. He was the one that signed it, yes.

Q. After Mr. Vogler had been down to see Mr. Harmon, when he came up here at Mr. Harmon's request at the time Mr. Harmon was in jail, Mr. Vogler came down and had quite a talk with you about the matter, did he not?

A. He talked with me several times, yes.

Q. And did he not tell you, Mrs. Harmon, that if you could raise a sufficient sum of money to carry on this business that he would let you try it for a while?

(Testimony of Mrs. Gertrude Harmon.)

A. Mr. Vogler didn't tell me to raise any sum of money, and didn't say anything to me about canceling the contract, at the time he spoke to me.

Q. You don't know what conversation he had had with Mr. Harmon?

A. I have no way of knowing what he said to Mr. Harmon.

Q. Mr. Harmon was still at that time as much President of the company as he was at the time this contract was made, was he not?

A. I don't understand your question?

Q. Mr. Harmon was still President of the company at the time he got in jail?      A. Yes.

Q. That is, assuming that it was a corporation?

A. Yes.

Q. And he had the general management of the business of the company still in hand, as much as he ever did?      A. Yes.

Q. Now, did you not refer Mr. Vogler to the Northern Bank & [114] Trust Company to make inquiries as to your standing and your credit, and so forth?

A. I didn't refer him. Mr. Vogler knew who we had been doing business with.

Q. Didn't he ask you if he might go down and ask Mr. Collier of the Northern Bank & Trust Company, what your standing was?

A. I don't recall that he did, but he may have. I don't know.

Q. Mrs. Harmon, did you say, going back to that Parts Account, did you say that you paid the Parts

(Testimony of Mrs. Gertrude Harmon.)

Account every month? A. Yes.

Q. Will you find that Parts Account in your book for me? Which one of these books is it, the big one? Will you find it, please, for me, and I will be obliged to you (handing book to witness)? Did you find it, Mr. Harmon? A. Yes, I have it.

Q. Let me see that, if you please. See if I understand it. This, I understand, is the checks that you sent, I believe, and the left-hand side is the charges?

A. Yes.

Mr. IVEY.—I want to get Mr. Clark to take a look at that.

Mr. HALVERSTADT.—Your Honor, in order to save the record, but at the same time to save time, may it be understood that the same objection I made a while ago to this testimony be considered to all of this testimony of this witness?

Mr. IVEY.—Quite so. I am willing to stipulate.

The COURT.—To this line of testimony?

Mr. HALVERSTADT.—That which comes within the objection that I made.

Mr. IVEY.—Yes. [115]

Q. Mrs. Harmon, aren't you right sure or are you right sure that Mr. Vogler did not tell you that he would cancel that contract with the Harmon Motor Company, that he would have nothing more to do with the Harmon Motor Company, but that if you could get somebody else to finance you he might make some contract with you? Did you not have that conversation with him? A. No, I did not.

Q. Well, you are sure of that, are you?

(Testimony of Mrs. Gertrude Harmon.)

A. Absolutely sure; yes.

Q. Well, did you ever write to Mr. Vogler, or telegraph him, or tell him, that you were about to get some one to go in with you and would like to have that contract and run it yourself?

A. After the cancellation of the contract?

Q. Before or after?

A. I think there was some one wanted to go in business with me after they cancelled it, and I telegraphed to him; but not before.

Q. Is this the telegram that you sent (showing paper to witness)?

A. Yes.

Mr. IVEY.—I would like to have this marked for identification as Defendant's Exhibit "A." Mr. Halverstadt, have you seen this telegram?

Mr. HALVERSTADT.—I don't know. I have *one* seen one telegram. (Examining paper.) We object to this telegram because it is a telegram that is dated after the cancellation of the contract. In other words, it had absolutely no bearing on anything in this case. [116]

Mr. IVEY.—This telegram, your Honor please, is dated February 24th. The cancellation took place about February 12th, I think.

Mr. HALVERSTADT.—The cancellation was sent on the 22d.

Mr. IVEY.—This witness said she didn't have any talk with Mr. Vogler about getting someone else to go in partnership with her, to finance her.

The COURT.—Let me see the telegram. (Paper handed to the Court.) Sustained at this time.

(Testimony of Mrs. Gertrude Harmon.)

Mr. IVEY.—Like an exception, your Honor.

Q. Mrs. Harmon, returning to this payment of these parts, will you show me there where the checks were sent?

A. These here is the checks over on this side (showing).

Q. These are checks on the right-hand side?

A. Yes.

Q. July 10, 1914, \$25.00. Was that a check sent to the defendant company?

A. Where is that?

Q. Here. You sent them a check at that time for \$87.25? A. Yes.

Q. And on July 14th, you sent them another check for \$1.12.

A. That is the journal. I presume that must have been a credit.

Q. Then on July 27, 1914, you put on another credit memorandum, \$28.38. August 31, 1914, still another credit item of \$3.70. And on September 30, 1914, and October 31, 1914, some more credit items, But you don't find those checks that you sent them, do you?

A. I don't know whether those are checks or credit entries. I believe those are credit entries.

Q. In other words, there is nothing in this book to indicate [117] you have sent a check?

A. Let's see—they are all marked "J." Yes, it is either a check or credit memo. I believe this is the only credit memo. That is marked "Credit Memo" here.

(Testimony of Mrs. Gertrude Harmon.)

Q. Well, can you find from any book that you have in court here now those checks that you sent down there on the Parts Account?

A. Yes, the cash-book will show it.

Q. Which one is that?

A. That big one there; this is the one here (indicating). What checks did you want to find out, Mr. Ivey?

Q. I want to know what amounts you sent, say from October, 1914, up to February, 1915, on the Parts Account, what checks you sent?

A. Here is starting October (showing).

Q. Just give me the dates. Is that October?

A. Yes, this is starting October, 1914.

Q. All right. There is a difference between our accounts here of about six or seven hundred dollars, that is what I am getting at.

A. Do you mean on the account—

Q. We have about four or five hundred dollars against you on the Parts Account, and we used part of that twelve hundred dollars to pay that, and that left about five or six or seven hundred dollars of the note unpaid, that is what I am trying to get at. You think you sent checks to cover the Parts Account?

A. No, I didn't say the Parts Account was paid at the time of the cancellation. I admit the current accounts part may have been about five hundred dollars, and checking off the [118] credit memos, our defective parts, would have brought what we actually owed the Northwest Auto Company to about \$250.00.

(Testimony of Mrs. Gertrude Harmon.)

Q. I understood you said you sent them checks about once a month?

A. If we bought parts we paid for them by the 10th of the next month. We might not have bought any parts at that time. I don't know.

Q. Can you find from any book you have in court just exactly the balance that your company owed the defendant company in February, 1915, on the Parts Account?

A. The Reo parts ought to give it.

Q. Are they footed up anywhere?

A. No, I don't believe they are footed up anywhere. I never went through and footed up the bills. After that contract was cancelled I dropped the books and let it go at that.

Q. All right, we will foot them up a little later.

Mr. IVEY.—I think I have no further questions to ask the witness.

Redirect Examination.

(By Mr. HALVERSTADT.)

Q. Mr. Ivey, there is a letter I should have asked about on direct?

Mr. IVEY.—All right.

By Mr. HALVERSTADT.—(Q.) Mrs. Harmon, I don't know whether I misunderstood you on cross-examination or not. I understood you to say that the only automobiles which you have sold were those sold to your agents on contracts?

A. No, I didn't say that, Mr. Halverstadt. [119]

Q. Now, in addition to those which had been sold to your agents on contracts how many specific sales

(Testimony of Mrs. Gertrude Harmon.)

do you remember where you can recall the names of the purchaser?

A. We sold three that we gave the money back on. One to Mr. —do you want me to name off the name?

Q. If you will?

A. Mr. Vanlinda, on Vashon Island; Mr. McClelland—I think it is John McClelland. He is a machinist in town.

Q. Where does he live?

A. He is in Seattle. Mr. Lysons, the attorney.

Q. Sitting right here by Mr. Piles?

A. Yes. And a Mr. Cline.

Q. Where does he live?

A. He is a Seattle man.

Q. Any others you remember?

A. A Mr. Cats in Port Townsend.

Q. Any others? Who were the three to whom—

A. Mr. Wright, Mr. Cooley and I didn't recall the other name of those three.

Q. Is that H. D. Cooley, the attorney in Everett?

A. In Everett, yes.

Q. Now, then, of those three, of those names you have mentioned, to how many did you have to return the deposit? A. Three.

Q. Do you remember the names of the three?

A. That was Mr. Wright, and Mr. Cooley, and I didn't recall the third name.

Q. Is it Mr. Cats?

A. Yes, it was Mr. Cats.

Q. Those are the three. Now, I believe counsel asked you on [120] cross-examination whether at



(Testimony of Mrs. Gertrude Harmon.)

the time Mr. Harmon was in jail he was not manager of the company, or president, something of that sort. Now, did you or did you not at that time take over whatever stock he had in the company?

A. Yes, I did.

Q. Do you remember approximately the date that you did that?

A. It was the first week in February. I don't know the exact date.

Mr. IVEY.—Which stock are you talking about?

Mr. HALVERSTADT.—The stock in the McKenna-Harmon Company.

Mr. IVEY.—I don't quite see what that has to do with it. Are you talking about the stock—

Mr. HALVERSTADT.—The capital stock.

Mr. IVEY.—The capital stock in the McKenna-Harmon Company?

Mr. HALVERSTADT.—The certificates were made out in the name of the McKenna-Harmon Company, the original certificates.

Q. You took an assignment of those? A. Yes.

Q. And at the time of that assignment, and after that, did he have any connection whatever with the Harmon Motor Car Company?

Mr. IVEY.—I object to that, your Honor please, unless that is brought to the knowledge of the defendant, because we wouldn't know about this interchange of stock as between these parties.

The WITNESS.—Mr. Vogler did know.

The COURT.—You may state whether he had any connection with that concern after that.

(Testimony of Mrs. Gertrude Harmon.)

By Mr. HALVERSTADT.—(Q.) Did Mr. Harmon have any connection with the concern? [121]

A. Not after that time, no.

Q. Never has had since? A. Never has since.

Q. Were those matters told Mr. Vogler when he was here in the first part of February, 1915?

A. Yes.

Q. Did you tell Mr. Vogler Mr. Harmon had no connection with it?

A. Well, Mr. Vogler was in town at the time Mr. Harmon gave me the assignment.

Q. And Mr. Vogler knew about that?

A. It was almost along his instructions it was done.

Q. And he was, you say, what officer of the defendant company? A. President.

Q. And what officer was he at that time?

A. President.

Mr. HALVERSTADT.—I will offer in evidence Plaintiff's Exhibit "12." I will have to prove it first.

Q. Calling your attention to a letter marked Plaintiff's Exhibit "12," I ask you whether that was sent to the Harmon Motor Car Company?

A. Yes, it was.

Q. By whom?

A. Northwest Auto Company.

Mr. HALVERSTADT.—I offer the letter in evidence.

Mr. IVEY.—No objection.

The COURT.—Admitted.

(Testimony of Mrs. Gertrude Harmon.)

Letter referred to received in evidence, marked Plaintiff's Exhibit "12" and made a part of the record herein. [122]

By Mr. HALVERSTADT.—(Q.) When that draft came in was it taken care of? A. Yes.

Q. Through that bank?

A. Through the Northern Bank & Trust Company, yes.

Q. Through the Northern Bank & Trust Company. Counsel asked you whether Mr. Vogler did not ask you whether you had any objection to his going to the Northern Bank & Trust Company. Do you recall the occasion when any such conversation took place, if it did take place?

A. If he spoke to me anything about going to the bank it would have been in the first week in February, when he was up to see me.

Q. The point is this: Do you recall such conversation taking place?

A. I recall that Mr. Vogler asked me what arrangements I had at the bank, and how the bank had treated me, and was going to treat me; but I don't recall that he asked my permission to go to the bank.

Q. If he did ask you would you have declined to let him go?

A. Why, no, it wouldn't have done any good. If he wanted to go he would have gone, that's all there was to it.

Q. Would you have been unwilling he should go to the bank?

(Testimony of Mrs. Gertrude Harmon.)

A. Why, no. Mr. Collier was very favorable to us.

Mr. HALVERSTADT.—That is all.

Recross-examination.

(By Mr. IVEY.)

Q. Mrs. Harmon, were those drafts sent to the Northern Bank [123] at your request?

A. Yes.

Q. Well, do you recall that incident when Mr. Collier down there at the bank let Mr. Harmon have a car without first paying the draft, and that Mr. Vogler raised so much noise about it? Remember that, along in October, 1914, somewhere along there?

A. I don't recall anything of that sort.

Q. You don't remember that incident at all?

A. No, I do not.

Q. Mr. Vogler came up here and found out that the Northern Bank had let Mr. Harmon have that car without Mr. Harmon first having paid the draft, and got pretty sore about it and made the Northern Bank pay for it?

A. The Northern Bank had paid the drafts. No, I don't recall anything of that.

Q. Do you know what became—did Mr. Harmon not sell to Mr. Collier one of those Loziers?

A. No, he sold Mr. Phillips a Lozier.

Q. Mr. Phillips, who is connected with the bank?

A. Yes.

Q. The Northern Bank & Trust Company?

A. Yes.

Q. But you don't remember that other incident?

(Testimony of Mrs. Gertrude Harmon.)

A. No, I don't remember that other incident.

Mr. IVEY.—That is all.

(By Mr. HALVERSTADT.)

Q. Did Mr. Vogler make any objection to your doing business that way, your doing business regularly through the [124] Northern Bank & Trust Company?

A. Why, no, he never made any objection. It was understood.

Q. If there was any objection on his part to your doing so did you know anything about it?

A. No.

Mr. HALVERSTADT.—That is all.

Mr. IVEY.—That is all.

(Witness excused.)

**Testimony of J. M. Thornton, for Plaintiff.**

J. M. THORNTON, a witness produced on behalf of the plaintiff, being first duly sworn, testified that he was in the automobile business and had been in this business for nine or ten years, and that he had been manager of the McKenna-Harmon Company three or four months before it changed its name to Harmon Motor Car Company, and that he worked for these two companies about two years, terminating his services on February 22, 1915, and that he attended to the business of this company in the absence of Mr. and Mrs. Harmon, being familiar with the details of the same; that during the season of 1914 the Harmon Motor Car Company sold about one hundred and thirty-three cars, this number including four trucks; that the medium-priced car was put

(Testimony of J. M. Thornton.)

on the market in 1914 and that it created a demand for cars of that kind, saying: "Well, in 1914, in fact, years before there had been more [125] or less higher-priced cars, and beginning of the season of 1914, why, they began to build a lighter car; in fact, the price at that time was lower somewhat; and the cars began to have electric starter, and lights, and those things, modern conveniences, which give women and everybody an opportunity to use cars. In that way, why, it created great demand, we sold more cars, and ever since, why, the automobile business has been growing right ahead, which everybody probably knows"; and said that the sales during the season of 1915 of cars of this kind just about doubled that of the preceding year, and has doubled practically every year since, and as an automobile salesman he attributed that increase to the lowering in price, and also to the modern equipment; and that the Harmon Motor Car Company had at the time this contract was cancelled one of the nicest salesrooms in the automobile district of Seattle; that it was right in the center of the automobile district, on a corner, giving it two sides up and down half the block, and it was easier for an automobile agency which had been established several years to sell cars, than a new agency; that it carried a service department, showroom and shop; that this company advertised extensively and tried to keep up with its competitors in advertising; that there was a good demand for the Reo car in 1915, and that the Buick, Overland and Studebaker were the principal com-

(Testimony of J. M. Thornton.)

petitors of the Reo; that the price of the Reo was less than that of the Buick, which made it easy for the Reo to be sold; that the price of an automobile was a factor entering into sales. That the company got one car from [126] the defendant right after the contract was signed up; that the next lot of cars came in about the 27th of January, 1915, there being four in this lot, and that the Harmon Motor Car Company had no difficulty in disposing of these; that they were shipped with a draft attached, the draft being sent to the Northern Bank & Trust Company; that the Harmon Motor Car Company had an arrangement with the Northern Bank & Trust Company respecting a loan of the bank to take up bills of lading of this kind and that this arrangement had been in effect since the Harmon Motor Car Company had been in business, and was in effect at the time the contract was cancelled; that the next shipment of cars came about the 19th of February, and that the drafts were taken up promptly; it was right around the time that the contract was cancelled; that up to the 22d of February, 1915, the same fifty-three cars had been sold by the Harmon Motor Car Company that the plaintiff G. M. Harmon testified about and under the same terms as she stated. That he had made arrangements to establish an agency in Kittitas County; that the contract had not been definitely signed on the 22d, but that it was ready to close, and he had subsequently closed it for the Puget Sound Motor Car Company about the 17th of March. The contract of that agency was for four

(Testimony of J. M. Thornton.)

cars. That the witness telephoned a number of times to Portland demanding that cars be sent up, and that the parties to whom the Harmon Motor Car Company had sold cars were making demands for deliveries, and that this fact was communicated to the defendant; and the following proceedings were had: [127]

Q. Mr. Thornton, if deliveries had been made of cars as specified in this contract, Plaintiff's Exhibit "3," as follows: October, two; November, one; December, four; January, eight; February, twenty; March, twenty; April, twenty; May, fifteen; June, ten; if, I say, deliveries of cars had been made according to that schedule how many cars could the Harmon Motor Car Company have disposed of before the expiration of this contract on the 31st of July, 1915?

Mr. IVEY.—Object to that as calling for a conclusion of the witness. He may testify as to what contracts he had. I believe he has done that. And if we admit those machines would be taken here the ground would be covered. I don't believe the witness is qualified to say what would have happened if something else had happened. I submit that to your Honor.

The COURT.—I think he may give his conclusion as to probable additional sales. You can find out what basis he has for such conclusion.

Mr. IVEY.—I would like an exception.

Mr. HALVERSTADT.—Answer the question, Mr. Thornton.



(Testimony of J. M. Thornton.)

A. Well, during the season I would be safe in saying that we could have disposed of at least to a hundred and twenty-five Reo cars that season; for the simple reason that we had—all arrangements had been made, we had been advertising extensively, had been waiting for cars, working hard, we had lots of pep in the firm, nobody lying down that I know of. I know I was on the job night and day myself, and also my sales force, and we worked very hard, and there is no reason in the world why we [128] couldn't have practically doubled our sales of what we did in 1914, because everybody did.

The witness then stated that the Reo was a salable car; that the 1915 Reo had an advantage over the 1914 because it "had lots of power, and is easier riding, a larger car, more room, and the price was a whole lot less." He did not believe there was a prettier car on the market. That as an automobile salesman he would say that the car was a good one and easy to sell, and at the time the contract was cancelled there was a big demand for that car. That they had no trouble "as far as break-down with the Reo, as far as defective parts, we had very, very little considering the amount of business that we did"; that "we had lots of prospects, and, in fact, I believe that if we had had the cars we could have sold at least twenty or twenty-five cars right outright, right out of our showroom when they came in." That he meant by the term "outright" that they could sell the cars in the shop without going out to solicit the trade. That he was in Seattle when Mr. Vogler came here

(Testimony of J. M. Thornton.)

in February, 1915, and that the company owed the defendant some money on the balance of the note that was mentioned in Mrs. Harmon's testimony, and that an old Winton car was turned over to the defendant company for \$750.00 to apply on the balance that was due on this note, that Mr. Vogler was in Seattle about a week at that time, and he saw him off and on quite frequently, and that Mr. Vogler said nothing to him about the cancellation of the contract. At this point the attention of the witness was directed to a clause in the contract which [129] read: "The dealer (referring to the Harmon Motor Car Company) agrees to accept delivery of said Reo automobiles according to the following schedule, and to furnish detailed specifications at least thirty days prior to the date of delivery," and said that the word "specifications" as used in the contract meant the kind of model of the car, as a touring car or a roadster, for instance. That when he would make demands on the defendant he would tell them to ship "Reo cars regardless of what they had, we would be glad to have a roadster, touring car, or Six, if we could get it. We never got a Six"; that he telephoned them a number of times and told them to ship "all they could give us"; that these telephone conversations took place between October, 1914, and January, 1915; that the principal difficulty that the Harmon Motor Car Company had was in getting deliveries of the Reo cars.

The answer to the question as to the kind of service the Harmon Motor Car Company gave its customers

(Testimony of J. M. Thornton.)

was ordered stricken by the Court at the instance of counsel for the defendant. The Court also refused to permit the witness to testify as to whether the character of services which an agency rendered to its customers had anything to do with the sale of cars, to which an exception was noted, and also ruled that it was not necessary to make an offer as to what the answer of the witness would be.

On cross-examination the witness testified that under the terms of the contract that the Harmon Motor Car Company had with the defendant company nine cars had [130] been delivered, and that the Harmon Motor Car Company had contracts outstanding for fifty-three; that the contracts that had been reduced to writing with the Harmon Motor Car Company's customers called for forty-three; and that there were therefore forty-four cars that the Harmon Motor Car Company had agreed to sell that were not delivered by the defendant company; that the contracts that the Harmon Motor Car Company had with its customers were the same that were referred to in Mrs. Harmon's testimony.

He said that when he called up the defendant company, which he began to do along in September or October of 1914, he talked with Mr. Clark, and Mr. Clark said that the defendant was "doing what they could to get cars and they would ship us cars as soon as possible," and that he didn't doubt but that Mr. Clark was doing the best he could to get the cars; and the following proceedings took place:

Q. Don't you know, as a matter of fact, that every-

(Testimony of J. M. Thornton.)

body, in the season of 1914, practically everybody, had difficulty filling the orders for cars?

Mr. HALVERSTADT.—Just a minute. I want to make this objection, your Honor: If you will notice the contract, it provides this—

The COURT.—I think the objection should be sustained. We are not concerned with everybody.

That the sale of this type of car in 1915 was double that of 1914, and that the Buick, Overland and Studebaker doubled their sales in Seattle. [131]

The witness further stated that the Harmon Motor Car Company went out of business shortly after this contract was cancelled; that the Harmon Motor Car Company was solvent up to the time the contract was cancelled, and that it had gone out of business because they could not get any Reo cars to sell. That it had a great deal of property along about the 1st of January, 1915. The financial condition of the company was about the same in January, 1915, as it had been theretofore, but he could not say it was in splendid financial condition. He was in close touch with its business, and had been in its employ about two years. The Harmon Motor Car Company was the successor in interest of the McKenna-Harmon Company. The financial condition of the company in January, 1914, was very good, and they had made some money in 1914. They were a good deal stronger in January, 1915, than they were in January, 1914, in that they had spent lots of money in getting ready to do business in 1915, and that was what they were figuring on; that he thought, speaking generally,

(Testimony of J. M. Thornton.)

about fifteen hundred or two thousand dollars were spent getting ready to do business in 1915, in advertising and going out and placing agencies, but that he had no way of determining as to how much was actually spent, as the books of the company did not show it; and in referring to a certain Six car, in answer to the question as to what he (Clark) said was the reason why the Six had not been sent, stated, "I guess they hadn't gotten any Sixes yet themselves," saying that Mr. Clark told him that the defendant company could not get them. He had had a conversation with [132] Mr. Vogler when that gentleman was in Seattle the last time, just preceding the cancellation of the contract, with reference to the financial condition of the company, and he told Vogler that the Harmon Motor Car Company stood well at the bank and could lift all the Reo cars it could get. That Sharpe & Leader succeeded the Harmon Motor Car Company in handling the Reos, and the following question was asked and answered as follows:

By Mr. IVEY.—(Q.) Now, you say that when you would 'phone Mr. Clark about these cars you would give him specifications. Then in answer to Mr. Halverstadt as to what kind of specifications you gave him you said that you told Mr. Clark "Send up all you can." Is that the only specification that you gave Mr. Clark?

A. Well, Mr. Clark spoke about—I asked Mr. Clark for Reo cars, and Mr. Clark said that there would be Fours. He also spoke about what he was shipping, what would be on the road, if any; and, in

(Testimony of J. M. Thornton.)

fact, he told me that he couldn't get Sixes; he told me he couldn't get Sixes.

He told Clark to send to Seattle all the Fours he possibly could, and that they were sent bill of lading with draft attached.

The witness admitted that the company was indebted to him in the sum of about \$1200.00 for services performed and commissions earned during the latter part of 1914, and that shortly after this contract was cancelled this indebtedness was reduced to judgment in his favor.

That there never was a time when the Northwest Auto Company did not have at least thirty days' notice to send all the cars they could, which was in compliance [133] with the schedule in the contract. That he reduced his claim to judgment against the Harmon Motor Car Company after the cancellation of the contract in suit, and because they went out of business. That from January, 1915, to February 22, 1915, he was acquainted, generally speaking, with the financial condition of the Harmon Motor Car Company, that it was good, and that it did not have any financial troubles during that time. [134]

#### **Testimony of F. E. Harmon, for Plaintiff.**

F. E. HARMON, produced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HALVERSTADT.)

Q. Your name is Frank E. Harmon?

A. Yes, sir.

(Testimony of F. E. Harmon.)

Q. What connection, if any, did you have with the Harmon Motor Car Company?

A. President of the company.

Q. Now, what was the name under which the company originally went?

A. McKenna-Harmon Company.

Q. What was it?      A. Incorporation.

Q. When did it begin business, approximately?

A. Along in October, 1912.

Q. Along in October, 1912. And was the business begun by it continued thereafter?

A. Yes, sir.

Q. To what time, if you know?

A. I don't quite get what you—

Q. To what date was the business of the company continued, if you know?

A. Of the McKenna-Harmon Company?

Q. Of the Harmon Motor Car Company on down?

A. Up till about the 1st of March, 1915.

Q. Now, will you explain to the jury how you came to go under the name of the Harmon Motor Car Company?

A. Well, after McKenna and I had been in business for a very [135] short time—McKenna was not an automobile man, and hadn't had any experience with the automobile business, had only been in it a little while, and he wanted to get out of it and we bought him out. After we bought him out there was no reason for continuing the name of McKenna-Harmon Company, although we let the name go along for several months after, or sometime anyhow, and I

(Testimony of F. E. Harmon.)

went down—then we concluded we would call the company the Harmon Motor Car Company. So I went down to our attorney and requested him to change the name from the McKenna-Harmon Company to the Harmon Motor Car Company. The articles were gotten out and papers signed, but for some reason or other he overlooked filing them.

Q. And did you or did you not suppose that the name had been changed in all the particularity required by the statute? A. Absolutely.

Q. And did the business of the McKenna-Harmon Company go on as before? A. Yes, sir.

Q. The only difference being one—

A. The change of some of the officers of the company and—

Q. I mean so far as name is concerned?

A. No, the name, we changed the name to the Harmon Motor Car Company.

Q. In other words, is this correct: The same business, the business was carried on just the same as it had before, except under a different name?

A. Yes.

Q. Mr. Harmon, in February, 1915, did the Harmon Motor Car Company maintain a place of business in the city of Seattle? [136] A. Yes, sir.

Q. Where was it located?

A. Corner of Boylston and Pike.

Q. In what city? A. Seattle.

Q. How long had it been in that location?

A. Since June, 1913.

Q. Since June, 1913, continuously?



(Testimony of F. E. Harmon.)

A. Yes, sir.

Q. How was that arranged with reference to show-room, work shop and so on, that building?

A. Well, it was built according to my own ideas—

Q. For this particular business?

A. For this particular business, yes. The building was constructed as such.

Q. Was it in an advantageous position or otherwise?

A. Well, it was not—it was then the best location in town, and it is yet one of the best for the automobile business.

Q. Was Pike Street one of the much traveled streets? A. Yes, sir.

Q. Calling your attention, Mr. Harmon, to this contract which is marked Plaintiff's Exhibit "3," I will ask you whether that is your signature at the bottom? A. Yes, sir.

Q. Now, by whom was this form prepared, this form of contract?

A. By the Northwest Auto Company.

Q. By the Northwest Auto Company?

A. Yes, sir.

Q. Did you have any suggestions to make in the preparation of that form of contract? [137]

A. Why, not—

Q. That is, in the form of the contract?

A. In the form, no.

Q. Did anyone on behalf of the Harmon Motor Car Company except you have anything to do with the signing of that contract?

(Testimony of F. E. Harmon.)

A. Not—I wouldn't say they had anything to do with it, no, not with the signing of it, no, but they understood what was going to be in it practically.

Q. In other words, you looked after the negotiation of the contract?     A. Yes.

Q. You dissevered your connection with that business about what time?

A. About the 2d of February, 1915.

Q. Now, up to that time, Mr. Harmon, if you know, how many cars—I mean subsequent to the date of the signing of the contract to which I have just called your attention, and up to the time you severed your connection with the Harmon Motor Car Company, how many cars, if you know, had the Harmon Motor Car Company sold, that is, new Reos?

A. On this—on the '15 contract?

Q. On the contract in suit.

A. Fifty-seven.

Q. Fifty-seven. Now, could you mention the names of the parties to whom those cars were sold?

A. Yes.

Q. Will you do so, slowly?

A. Burke Motor Car Company, twenty.

Q. How many? [138]

A. Twenty.

Q. All right.

A. Knutzen Bros., Skagit County, twenty.

Q. For Skagit County how many?

A. Twelve in Skagit and eight in Whatcom.

Q. Now who else?

A. Kent Motor Car Company, three.

(Testimony of F. E. Harmon.)

Q. All right.

A. Fred C. Poole, three.

Q. Poole was in what territory?

A. Clallam, I think.

Q. All right, go ahead.

A. There is one thing I must say, Mr. Halverstadt. You asked me up to the severing of my connection with that company?

Q. Yes, sir.

A. Now, there is several retail cars that were sold, that I know were sold, and saw the orders myself, and checks, and gave the checks myself back to the people, but it was after the cancellation—

Q. You know of your own knowledge that was done?

A. I know that was done, yes, sir.

Q. Go ahead and mention them. Who were the names of the parties to whom deposits were returned? A. Cooley of Everett.

Q. That is attorney Cooley?

A. Yes, sir. And Mr. Wright in Seattle.

Q. And who else?

A. And Mr. Catts of Port Townsend.

Q. Now, then, were there any other parties to whom cars had been sold? [139]

A. Mr. McClellan in Seattle, Mr. Lysons, Mr. Cline.

Q. Some one spoke of— A. Mr. Vanlinda.

Q. On Vashon Island. Now, do you know anything about any negotiations having been carried on on behalf of the company for the establishment of

(Testimony of F. E. Harmon.)

an agency in Kittitas County?

A. Yes, with Mr. Nickerson.

Q. Had that been established at the time you severed your connection with the company?

A. No, it had not. I had been negotiating with him, and so had Mr. Thornton, and I know that Mr. Thornton made a trip to Ellensburg and made arrangements for the signing of the contract.

Q. Now, Mr. Harmon, if the Harmon Motor Car Company were unable to get delivery of cars and did not know when it could get delivery of cars, what effect, if any, would that have on the ability of the Harmon Motor Car Company to go out and establish other subagencies?

A. Well, naturally if you couldn't assure a man, or give a man a little idea, or very near the time of how soon he could get delivery it would be pretty hard for you to get an order. It would be more particularly so in retail sales than in wholesale sales.

Q. Well, why?

A. Because a dealer will figure he has got a certain season in which to sell, but if a retailer goes out and looks for a car he wants the car as soon as he makes up his mind which car he wants to buy.

Q. Do you remember how many cars were delivered by the [140] defendant in this case to the Harmon Motor Car Company? A. Nine.

Q. Do you recall about the date of the first delivery? A. October 19, 1914, one car.

Q. One car. What model? A. 1914.

Q. 1914 model? A. Yes, sir.

(Testimony of F. E. Harmon.)

Q. Now when, if you recall, was the next delivery?

A. January 29, 1915. That was four 1915 cars.

Q. That was four 1915 cars? A. Yes, sir.

Q. How were those four cars shipped with reference to payment?

A. Well, they were shipped the regular way, the way, I suppose, all the automobile dealers receive their cars.

Q. No, just how were those specific cars shipped with reference to draft or bill of lading?

A. Well, with sight draft attached to bill of lading.

Q. And how was that draft taken up?

A. Well, simply—how was that particular draft taken up?

Q. Yes.

A. Simply went down to the bank and gave them a check for the amount of the cars, for the amount of the draft, rather, and they immediately released a bill of lading to us, and we went down and got the cars.

Q. Was there any delay in taking that up?

A. Absolutely none.

Q. Was there any delay in taking up the one car which came in? A. None at all.

Q. Now, during what period of time, if any, was such an [141] arrangement between the Harmon Motor Car Company and the Northern Bank & Trust Company?

A. Well, you mean what arrangement?

Q. No. I say during what length of time was that arrangement between the Harmon Motor Car Com-

(Testimony of F. E. Harmon.)

pany and the Northern Bank & Trust Company in existence theretofore?

A. Why, it had been an arrangement for a year and a half or so, or more.

Q. Had you ever had any difficulty whatever in getting the bank to take up a draft for you if you didn't have money enough on hand when they come?

A. Never at all.

Q. At the time you left the Harmon Motor Car Company, severed your connection with it, had that arrangement been entered into for the coming season, the season of 1915?

A. I didn't quite catch that?

Q. Had you made such an arrangement with the bank at the time you left for the season of 1915?

A. Yes, I had that arrangement made—always had it—then in the regular way, and had the assurance of both the president and cashier of the bank there never would be any question in lifting Reo cars, and I can bring them up. I went down to the bank and explained to them if I could get cars during the month of December and January I would have to have considerable money to do that in order to have the cars, say, in March, April and May, when the selling season commences, I would have to have cars on hand to deliver them. I was assured by both the president and cashier they would lift every Reo car that came into this territory. [142]

Q. And never had any difficulty in having them doing it? A. No, sir, not at all.

Q. Now, Mr. Harmon, you were not with the com-

(Testimony of F. E. Harmon.)

pany when the last shipment came in spoken of here?

A. No, sir.

Q. Now let me ask you this question: What is the real automobile season, that is, the season in which cars can be sold; I mean at retail, not to subagents?

A. Well, March, April, May and June.

Q. Is that what you call the height of the season?

A. Yes, there is more cars sold then five to one than all the rest of the year put together.

Q. Just state why that is?

A. Well, it is only natural. The summer season is commencing, the winter is past, and the roads have gotten good, the driving conditions are at the best, the weather is at the best. It is only natural.

Q. When are the new models introduced on the market?

A. New models are generally introduced in the fall.

Q. Now, Mr. Harmon, what was the character of the 1915 Four and Six models of Reo cars as to character of construction, power, reliability and general desirability from the standpoint of the purchaser?

A. Well, the car was a very desirable car; it was a moderate price; small upkeep, and with all the latest modern equipment and improvements. The car gave elegant satisfaction and had a good reputation.

Q. How was it in respect to power?

A. The '15 had plenty of power.

Q. How with respect to ease in riding? [143]

A. Well, it was a very easy riding car. The 1915

(Testimony of F. E. Harmon.)

car was very much improved over our '14 car.

Q. Now, what did those cars, the two models, cost you at the factory?    A. List or our net cost?

Q. List.

A. Ten-fifty on the Fours and thirteen eighty-five on the Six.

Mr. IVEY.—Better get the catalogue, I think, if you want to testify to that.

Mr. HALVERSTADT.—Why, he can testify to what he paid and what they cost him.

Mr. IVEY.—Go ahead.

By Mr. HALVERSTADT.—(Q.) What did you say they cost?    A. Ten-fifty—not cost, but list.

Q. List, I mean.

A. Ten-fifty on the Four and thirteen eighty-five on the Six.

Q. Now, at what price did you sell those to people laid down in Seattle?

A. Eleven seventy-five on the Four and fifteen twenty-four on the Six.

Q. Mr. Harmon, what season was it, or when was it that the self-starter and the electric light was introduced in the automobile, what year?

A. Well, '14 was the year that nearly all of the cars came out with them. There was quite a few had them in '13, two had them in 1912, and '14 was the year they were really introduced.

Q. That is when they became general?

A. Yes.

Q. Now, what effect did the equipping of the car with a self-starter [144] have on the volume of



(Testimony of F. E. Harmon.)

sales that could be made of automobiles?

A. Well, the self-starter, with the many other improvements they put on, of course naturally increased the volume of sales to a very great extent.

Q. Why?

A. Well, because the cars were easier to handle. People before—if somebody was not very strong and weren't able to crank the car, why get them? Many of the women commenced driving. In fact, it is just like it is now, the women drivers become more and more prominent, and such things as that.

Q. How did the sale of automobiles generally during the year 1915 compare with sales of any previous year?

A. I believe statistics will show the sales are more than doubled.

Q. Why was that?

A. Well, one reason was the improvement of the cars and reduction in price.

Q. Were what?

A. The improvement in cars and reduction in price, along with the increased demand for cars.

Q. Any other factors that enter into that occur to you?

A. Well, I can't say. I think that—well, business people begin to find that cars can be used in their business to such a great extent. A business man will find it will enable him to get around quicker and make more money, because he can get around quicker, and such things as that.

Q. And at that time, during that season, did auto-

(Testimony of F. E. Harmon.)

mobiles [145] become sort of a business man's equipment? A. It did.

Q. Was that general or only—was that true generally or only in a very small degree?

A. Oh, that is true generally.

Q. That's true generally. What other model cars, what other cars were in competition with you in selling the Reo automobiles?

A. I didn't get that?

Q. What were the cars in competition with you in selling retail Reo automobiles?

Mr. IVEY.—I have never seen the materiality of that, your Honor.

The COURT.—I don't see the materiality.

Mr. HALVERSTADT.—All right.

Q. How did this car, the Reo car, compare with any other car, with a car of any other make, as to size, power, appearance or general desirability or reliability?

Mr. IVEY.—I object to that, too, your Honor, please.

Mr. HALVERSTADT.—Or salability.

Mr. IVEY.—We let a lot of that go in before; thought it was the easiest way out of it, but I don't see the materiality of it.

The COURT.—Sustained.

Mr. HALVERSTADT.—Exception, please. Your Honor, I am having Mr. Harmon make a calculation in writing which I will hand to counsel in the morning, and he hasn't quite completed it. Might we

(Testimony of F. E. Harmon.)

adjourn until to-morrow?

The COURT.—You may adjourn court until to-morrow morning.

Court adjourned until Friday morning. [146]

**Testimony of F. E. Harmon, for Plaintiff  
(Resumed).**

F. E. HARMON, a witness for the plaintiff, recalled for continued examination, further testified as follows:

Direct Examination (Resumed).

(By Mr. HALVERSTADT.)

Q. Mr. Harmon, what, if anything, in addition to what you testified yesterday—what condition, if any, in addition to what you suggested yesterday afternoon, created a demand, an especial demand for automobiles in the city of Seattle in the year, latter part of the year 1914 and 1915?

Mr. IVEY.—Object to that, your Honor, please, as being immaterial.

The COURT.—I don't know that I got the full force of the question. (Question repeated.)

Mr. IVEY.—I contend, your Honor, please, that doesn't prove any particular transaction could have taken place, even though the witness, would say the demand was great at that time. I don't believe it even has a tendency to prove that. I think it is speculative and, therefore, it is immaterial. I mean it is immaterial because it doesn't tend to prove the plaintiff's rights to damages. [147]

(Argument.)

(Testimony of F. E. Harmon.)

The COURT.—I think the question may be answered.

Mr. IVEY.—Exception.

Mr. HALVERSTADT.—Read the question, please.

Q. (Question repeated.)

A. Well, along with the other things I named yesterday, one thing in particular was the coming of the jitney bus. That is a thing there that brought out several hundred sales, a good many hundred sales, in the city of Seattle alone; and the Reo car was a practical car for that because of its features of being cheap in operation, and such things as that, and there were a good many Reos and such cars as that sold.

Mr. IVEY.—I move, your Honor, to strike that out for this reason: Counsel's general statement—because he starts off with the hypothesis that under a contract of this kind the plaintiff is entitled to recover prospective damages. That is where his fallacy is, I think. Now what, your Honor, has the jitney business to do with this contract that the defendant had with the Harmon Motor Car Company? Does that prove that one of those jitney drivers would come down and buy a car from the Harmon Motor Car Company, or if they did buy it they would pay for it? Has it any bearing on it at all? I say not. And it is just that kind of testimony that I have been objecting to right along. Now, I make this motion to strike and to submit it again to your Honor for ruling.

(Testimony of F. E. Harmon.)

Mr. HALVERSTADT.—I will follow this testimony further with the testimony that this particular make, brand new, was put in that service; or at least I understand that is the [148] fact.

Mr. IVEY.—Well, suppose it was, if your Honor please, suppose there was half a dozen jitney fellows drove those around. We may have notice they are being driven up and down the street; but what has that got to do with our contract?

(Argument.)

The COURT.—I can see how this testimony might be material for consideration, and I think the motion must be denied.

Mr. IVEY.—Like an exception.

The COURT.—It may be the Court will be required to limit the consideration of this testimony in the instructions, but the motion must be denied.

By Mr. HALVERSTADT.—(Q.) Now, Mr. Harmon, the term “jitney” is a new one and I don’t know whether it has any established legal meaning. For the purpose of the record state what is meant by the term “jitney.”

A. Why, it is—it’s an automobile.

Q. What is a jitney bus as the term is used?

A. It is an automobile that is used to carry passengers for the same fares and running them on practically the same streets as the street cars, and for the same fares that the street cars charge; in other words, five cents, most of them; on others, of course, they charge ten.

Q. I see. Now, Mr. Harmon, do you know of any

(Testimony of F. E. Harmon.)

new Reo cars, such as are mentioned in the contract in suit here, being sold for and used in the jitney bus service?     A. Yes, sir.

Q. Prior to July 31, 1915?     A. Yes, sir.

Mr. IVEY.—My objection goes to that also, your Honor, please. [149]

The COURT.—Sustained.

Mr. HALVERSTADT.—May I ask your Honor was it because of the form of the question that the ruling was made?

The COURT.—No. I think the mere fact that this character of car may have been used in that sort of service, why, it would not, if it is, aid us here.

Mr. HALVERSTADT.—Note an exception. That question may not have been finished, and merely to save the ruling I will add to it, “in the territory covered by this contract in suit,” which I assume will not change the Court’s ruling.

The COURT.—No.

Mr. HALVERSTADT.—Exception.

Q. Mr. Harmon, these subagents who were employed, or to whom contracts had been sold by the Harmon Motor Car Company, were they responsible financially?

A. Yes, they were. Any one of them have a—

Q. All of them?     A. All of them.

Mr. IVEY.—I object to that, your Honor, as stating a conclusion, and move to strike the answer out. Responsible financially doesn’t mean anything; it is

(Testimony of F. E. Harmon.)

a conclusion. He can ask him how much those people had, if he knows.

The COURT.—I think the objection must be sustained and the answer must be stricken.

Mr. HALVERSTADT.—Exception. Let me put it this way, possibly this will not be objectionable.

Q. What was the reputation of these agents for discharging their obligations?

Mr. IVEY.—I object to that, your Honor, please, for the reason that would be another conclusion that he will state. [150] He may state, if he wants to, what these agents owned and what they had done theretofore, something of that kind which are facts, but this man's reputation I think would be immaterial. His reputation might be one thing with one man and one thing with another.

The COURT.—The objection must be sustained. The witness hasn't shown he has any knowledge that would enable him to testify to that.

Mr. HALVERSTADT.—Exception.

Q. Mr. Harmon, had the Harmon Motor Car Company had any of these agents during any preceding season as subagents?

A. Had two of them, yes, three.

Q. Which three?

A. Kent Motor Car, Poole and Burke.

Q. During that season did they comply with their contracts? A. Yes, sir.

Q. Any trouble with them at all?

A. Absolutely none whatever.

Q. Now answer this question yes or no, and wait

(Testimony of F. E. Harmon.)

till an objection is made, if one is made: Do you know, Mr. Harmon, what was the financial worth, or approximate financial worth, of Knutzen Bros., one of the agents mentioned here? Answer it yes or no, if it can be answered yes or no.

A. I can answer what their rating was.

Q. Well, what was their financial rating?

A. Seventy-five thousand—

Mr. IVEY.—Object to that, your Honor, as not being material.

The COURT.—Sustained.

By Mr. HALVERSTADT.—(Q.) By whom was this rating made? [151]

A. Bradstreet.

Q. Now, what is Bradstreet's?

A. A mercantile agency that looks up the standing of different business firms, or anybody in particular.

Q. How general is the use of Bradstreet's Mercantile Agency for the purpose of determining a man's solvency or otherwise and the extent of credit to which he is entitled?

A. Well, it is used by nearly all the business firms.

Q. In what part of the country?

A. Everywhere.

Q. Is it a standard guide everywhere?

A. Yes, sir.

Q. Now, I will ask you whether it is or is not used in the commercial world generally in the United States? A. Yes, it is.

Q. Now, I will ask you what was the rating given



(Testimony of F. E. Harmon.)

Knutzen Bros. in Bradstreet's, by Bradstreet's during the period when this contract was in force and effect?

Mr. IVEY.—I object to that, your Honor, please, The witness hasn't stated that he knows in the first place.

Mr. HALVERSTADT.—He said he did know.

Mr. IVEY.—No, I mean he didn't say he knew what the rating was during this period.

Mr. HALVERSTADT.—I will withdraw that question and put this:

Q. Do you know, Mr. Harmon,—answer yes or no—what rating Bradstreet's gave to Knutsen Bros. during the term of the contract in suit here?

A. Yes, sir.

Q. Now, what was that rating?

Mr. IVEY.—I object now, your Honor, please, on the ground [152] that it proves nothing and it is immaterial.

(Argument.)

Mr. HALVERSTADT.—I will withdraw that question temporarily and put this one:

Q. For how long a period of time to your knowledge has Bradstreet's report been so used by the commercial world? A. It is past my memory.

Q. Just what do you mean by that?

A. Well, I mean I can't remember back how far. Ever since that I can remember I can remember of Bradstreet & Dunn.

Mr. HALVERSTADT.—Now I will renew the former question.

(Testimony of F. E. Harmon.)

The COURT.—This is the way it impresses me. Bradstreet's report or rating is made, of course, from reports of their various representatives. It is a conclusion based upon a report made by its representative at the particular place where these parties are located. So far as the report is concerned as against the defendants in this case it would be clearly hearsay, because it would deprive the defendants of a cross-examination upon statements or conclusions made by this representative, and, therefore, would deny them the right which the law accords them. And the same conclusion must follow if you consider the general reputation in the light of a general reputation in the community where these people do business, because it is based upon a conclusion of a party who, so far as the proceeding in this court is concerned, has not shown he is acquainted with that general reputation, and the defendant would be deprived of the same right on cross-examination to find out if his conclusion is based upon the right premises. Standing alone, without any evidence of the assets possessed by these [153] parties, I don't think that the Court should receive it. A court might consider, or permit the jury to consider, such a report after it had been established that these parties did own property, or have actual assets that were not encumbered, and assets in excess of liabilities. The objection must be sustained.

Mr. HALVERSTADT.—Exception.

The COURT.—Yes. And I will state now that I feel, and the conclusion is not simply a conclusion of

(Testimony of F. E. Harmon.)

the moment, but I am impressed in this conclusion by some investigation I made of this sort of subject some years ago when I was retained as an assistant to a public prosecutor in prosecuting some bank officials who had been arrested, and it became necessary to establish the financial standing and status of the bank.

Mr. HALVERSTADT.—I will simply say, your Honor, the case we were relying on—the Supreme Court of this State, of course, is not binding on this court—but just lately decided where that identical question arose.

The COURT.—I will be very glad to see that case. You may present this matter again.

By Mr. HALVERSTADT.—(Q.) Mr. Harmon, up until the time you severed your connection with the Harmon Motor Car Company, and during the time that Mr. Thornton had an account on the books coming to him, state what that account included, how it was made up, what items entered into it?

A. Well, in the first place, his salary—he drew a salary—and then the commissions on every car that he had sold.

Q. Now, did that account vary? A. Yes. [154]

Q. Dependent on what?

A. Dependent on the amount of sales that he had made and on how much money he had drawn.

Q. Was or was he not permitted to draw whatever amount he pleased whenever he chose?

A. Yes, he was.

Q. Did he ever at any time express to you any de-

(Testimony of F. E. Harmon.)

sire to have all of it? A. Never had.

Mr. IVEY.—I object to that, your Honor, please; that is hearsay. No agent of ours present.

The COURT.—Let the answer stand.

By Mr. HALVERSTADT.—(Q.) Was there at any time any demand on his part for any part or all of that account which was not complied with?

Mr. IVEY.—Object to it, your Honor, please, unless it is in writing.

The COURT.—Let him answer.

Mr. HALVERSTADT.—Read the question, please.

Q. (Question repeated.)

A. No, sir.

Q. You are speaking now, of course, during the period that you were connected with the concern?

A. That I was connected, yes, sure.

Q. One thing that was called to my attention last night, Mr. Harmon, that is to the effect that you answered the question of how many cars had been actually sold by the Harmon Motor Car Company up to the time you left, and that the number was fifty-seven. Was or was not that answer made before? [155]

A. Yes, that was the answer I made.

Q. Well, is that correct?

A. That is correct if you would include four cars—there was fifty-three actually sold, but there was four cars that were practically sold; that is, Thornton had gone to Ellensburg and made arrangements for the selling of them, all the details and everything, but for some reason or other he didn't get the thing signed

(Testimony of F. E. Harmon.)

at that particular time and had to lay over a few days. Within two weeks, or three weeks, something like that,—oh, we will say within thirty days, he went over for the company that succeeded the Harmon Motor Car Company in handling the Reo and signed up identically the same contract for them that he would have for the Harmon Motor Car Company.

Mr. IVEY.—I move to strike that out unless the witness produces the contract that he says was signed up.

Mr. HALVERSTADT.—All right, produce the contract; you have it, the one for Ellensburg.

Mr. IVEY.—Have we got that?

Mr. HALVERSTADT.—Yes, sir. If you give it to us we will introduce it.

Mr. IVEY.—We don't seem to have it. Are we supposed to have it?

Mr. HALVERSTADT.—Why, certainly. Will you please let this go till noon?

Mr. IVEY.—Yes.

Mr. HALVERSTADT.—Thank you.

Mr. IVEY.—Who did the witness say signed that particular contract?

By Mr. HALVERSTADT.—(Q.) What was the name of the party over [156] there making that contract? A. Nicholson Auto Company.

Mr. IVEY.—When was it supposed to have been signed?

Mr. HALVERSTADT.—Just very shortly—in the early part of March some time, March, 1915, or maybe in the latter part of March.

(Testimony of F. E. Harmon.)

The WITNESS.—March—along in the latter part of March or first of April.

By Mr. IVEY.—(Q.) Who was the seller in that contract?

A. Puget Sound Motor Car Company.

By Mr. IVEY.—(Q.) You mean that was Sharpe & Leader? A. Sharpe & Leader, yes.

By Mr. HALVERSTADT.—(Q.) Mr. Harmon, I call your attention to an instrument marked Plaintiff's Exhibit "13," consisting of two sheets, and I will ask you to state very briefly just what it is; not its contents, but what it is.

A. Well, one sheet shows the profits that could have been made on cars that I—

Mr. IVEY.—Move to strike that out, your Honor.

A. (Continuing.)— that should have been paid.

The COURT.—Let's find out what it is. Proceed.

A. (Continuing.) Well, one shows a profit that should have been paid—

By Mr. HALVERSTADT.—(Q.) By whom to whom?

A. Well, it is a difference of what the cars would have sold for selling to agents and retail sales, the difference between what the Harmon Motor Car Company would have paid and what they would have gotten for the cars. The second—in another instance it shows what profits could have been made on cars if they had been delivered and the contract [157] continued by the Northwest Auto Company.

Q. Proceed if it shows anything else.

A. It also shows the gross profits of this and the

(Testimony of F. E. Harmon.)

net expense of selling these cars, and it shows the total amount of profits. And in the second sheet it shows an itemized list of what the overhead would have been and what that expense would have been to have sold those cars, and is based on what the expense was, approximately the expense was the previous year, including commissions and all the general overhead and everything.

Q. Did you make this statement?

A. I assisted.

Q. From what data were these figures secured? In other words, explain to the Court and jury what basis you used for these figures? A. We used—

Q. Now take, for instance, first the number of cars which had been actually sold at the time this contract was cancelled. What basis of computation did you use there?

A. Well, we took, in the first place, what the cars would cost us—

Q. Meaning Harmon Motor Car Company?

A. Cost the Harmon Motor Car Company, yes. Then we took what we would have gotten for the cars when they were delivered.

Q. Exactly. Now, then, as to cars which had not been sold at the time this contract was cancelled, how did you treat those; what was your basis of computation to get the gross profit?

A. The same way. We would take what the cars would have cost us and what we would have sold them for. [158]

Q. And what you would have sold them for. Now,

(Testimony of F. E. Harmon.)

then, in the expense which you mentioned as overhead expense in selling these cars, what items did you include? I don't mean each definite item, but expense for what, or doing what?

A. Include our general overhead.

Q. By that you mean what?

A. Rent, light, telephone, and all such as that.

Q. All right.

A. And shop salaries, and office salaries, and salesmen's commissions, and so on and so forth, everything that would be necessary to sell that many cars.

Q. Exactly. And what did you include in the item of profits on your shop and so on; what was the basis of computing that?

A. I, of course, figured a loss of a certain amount, and, in a way, I would figure profit—if you were paying a man so much a month, after you had figured so much for upkeep of cars, and such as that, if you were keeping a shop force of two or three men and paying them, say, thirty-five or forty cents an hour and getting seventy cents an hour for the time, you would have to figure a certain profit. If we buy a certain article, such as parts or accessories, if we bought them for seventy-five cents and sold them for a dollar there would be a profit. I figured approximately what our net profits would be, based on what they were the year previous, not even figuring for the increase.

Q. Now, on this sheet there is an item marked as "Deposit on contract." What is that?

A. That is \$750.00 deposit on—



(Testimony of F. E. Harmon.)

Mr. IVEY.—I object to the details of that matter being discussed [159] any further, if the Court please.

Mr. HALVERSTADT.—That is well taken. I will withdraw that question. I did it inadvertently. Now, I offer the statement in evidence.

Mr. IVEY.—I object to it, your Honor, please, as being wholly immaterial, irrelevant and incompetent. The witness testifies that he made up this statement from the assumption that he was going to make certain profits, and certain things were going to happen, and certain cars were going to be sold, and a lot of other assumptions. We don't know whether any of those things would have happened or not. I don't know what this sheet shows (indicating.) It probably shows that thirteen thousand dollars. I was trying to find out something about what it was and I was headed off, but I can take right now, if your Honor please, a catalogue and I can talk to Mr. Vogler here—

Mr. HALVERSTADT.—I will withdraw the offer temporarily.

Q. Can you state from memory all the figures which would be necessary to show the profit that you would have made on each of these cars had the orders been sold? A. No, sir; not from memory.

Q. I will ask you whether this Exhibit "13," Plaintiff's Exhibit "13," is one which you have prepared for the purpose of testifying to those matters?

A. No, it is not. It is what we have figured out is

(Testimony of F. E. Harmon.)

the absolute facts in the case.

Q. Then it does show the facts in the case?

A. Yes.

Q. Now, then, there is in evidence here a contract of sale of three cars to the Kent Motor Car Company. Now, what [160] would those three cars each have cost the Harmon Motor Car Company?

Mr. IVEY.—Object to that now, if your Honor please, if this witness is testifying from the statement they are trying to introduce. He can testify, if he wants to, as to how much he was paying us for those cars, then he can testify, if counsel wants him to, as to what the purchaser from him was to pay him.

Mr. HALVERSTADT.—All right.

Mr. IVEY.—Unless that is an oral contract.

Mr. HALVERSTADT.—All right.

Mr. IVEY.—If you have got your written contract of record I believe that proves everything the witness could possibly testify to.

Mr. HALVERSTADT.—Here is the situation, your Honor. This will involve a considerable number of items of an account. I defy any twelve men to sit in the jury-box and carry all these figures in their head and get anywhere within five hundred thousand dollars of the result; it can't be done. Now we have a right to put this down in black and white for the purpose of aiding them in determining the fact.

Mr. IVEY,—No objection to putting facts down in black and white, but this is a speculation. Mr. Vogler could tell me right now I could make five hundred dollars on a certain Lozier car, for instance,

(Testimony of F. E. Harmon.)

and I could figure out here in a few minutes how I could be a millionaire in a year. I could just figure that thing out like this thing has been figured out there and see myself a millionaire right away. They say you can rent an old barn down here at ten dollars a month, and so forth, and that is the [161] thing we are confronted with here.

Mr. HALVERSTADT.—All right. Now, the Court will bear in mind I am asking now as to a definite contract of sale.

The COURT.—He may answer the question.

Mr. HALVERSTADT.—Read the question, please.

Q. (Question repeated.)

Mr. IVEY.—I will ask the witness this question: Isn't the cost of those automobiles now you are speaking of stated in this contract?

A. Not the net cost, just what the discount would be.

Mr. IVEY.—(Q.) Are you talking about the contract now you had with your subagent? A. Yes.

Mr. IVEY.—All of them are the same, I suppose?

Mr. HALVERSTADT.—Except probably as to rates of commission.

The COURT.—Proceed.

By Mr. HALVERSTADT.—(Q.) Now, then, what amount of money would the Kent Motor Car Company, in dollars and cents, have paid you for those three cars, paid the Harmon Motor Car Company?

(Testimony of F. E. Harmon.)

Mr. IVEY.—I object to that, your Honor please. The contract speaks for itself if there is a contract.

The COURT.—If these matters are all in the contract, and the contracts are in evidence, the jurors can compute that. I understood the matter is in the contract, but not in concrete form as you have it there. It is simply a matter of computation. This isn't a matter where large items of book accounts are involved that requires an abstract and digest of the whole matter; it is purely a computation right from the contract itself. [162]

Mr. HALVERSTADT.—Exception.

Q. Mr. Harmon, what items entered into the net price of the cars to the subagents of the Harmon Motor Car Company? A. What items?

Q. Yes. Not in dollars and cents, but what items?

A. Well, there would be just the car and the freight.

Q. Now, was or was not the freight the same in all cases? A. No, it wasn't.

Q. All right. Now, in the case of the Kent Motor Company what was the freight which had to be added to the net price of the car to the Kent Motor Car Company? A. \$110.00.

Q. In the case of Knutzen Bros. what was the freight? A. Hundred and ten.

Q. In the case of Fred C. Poole what was the freight? A. Hundred and ten.

Q. In the case of Burke Motor Car Company of Everett what was the freight?

A. That was a hundred and five.

(Testimony of F. E. Harmon.)

Q. In the case of the sales to H. D. Cooley of Everett, to W. E. Wright and to W. H. Catts, what amount of freight would each of those pay?

A. \$125.00.

Q. Now, then, I think it is in evidence as to the retail sale price of these cars, is it not? You did testify to that, or did you not? A. Yes.

Q. Now, Mr. Harmon, did or did not the company make any profit, the Harmon Motor Car Company make any profit in the way of freight on the cars which it sold? [163]

Mr. IVEY.—Well, I object to that, your Honor, please. I don't see what that has to do with us.

Mr. HALVERSTADT.—It shows what was coming to it.

Mr. IVEY.—How would that profit on the freight affect us in any way? You mean to say they get a rebate or something? I don't quite see what you are getting at. Unless some foundation is laid for that I don't think it is material.

The COURT.—Yes, I don't understand the theory.

By Mr. HALVERSTADT.—(Q.) Mr. Harmon, tell me whether or not the Northwest Auto Company did anything in the way of fixing the amount of freight which should be charged by its agents to the agents of the Harmon Motor Car Company?

Mr. IVEY.—I don't quite see that yet either.

The COURT.—He may answer.

A. They didn't make it absolutely definite that you had to charge a certain amount. They couldn't. There was nothing provided anywhere in any con-

(Testimony of F. E. Harmon.)

tract for anything like that. But we generally tried to agree, at least Wing Brothers and ourselves—Wing Brothers are in Tacoma—to agree on the same price, and this last year we thought of trying to get together and establish a price of, I believe, fifteen twenty-five on Sixes and eleven seventy-five on Fours. The Northwest Auto Company, getting a larger amount, of course, than we, could afford sometimes to save freight a little more than we could.

By Mr. HALVERSTADT.—(Q.) And was that done with the knowledge and consent of the Northwest Auto Company, the defendant, that is, fixing of a definite freight rate? A. Oh, yes.

Q. Now then, Mr. Harmon, what amount of freight, what would [164] be the freight on one car to the Harmon Motor Car Company?

A. Around about \$95.00.

Q. Now, what amount of freight would the Harmon Motor Car Company charge a purchaser at retail on one of those cars?

A. Hundred and twenty-five.

Q. Hundred and twenty-five? A. Yes, sir.

Q. Well then, what amount of freight would they charge their subagents, the figures that you have mentioned heretofore? A. Yes.

Q. That is a hundred and ten dollars in all cases except Burke, a hundred and five? A. Yes, sir.

Q. Now, see if I have it right. There were then three figures for freight; \$105.00 to Burke Motor Car Company in Everett on each car? A. Yes.

Q. \$110.00 on each car to Knutzen Bros., Poole, Kent Motor Car Company and any other subagent?

(Testimony of F. E. Harmon.)

A. Yes.

Q. And to purchasers at retail of cars there was \$125.00 freight? A. Yes, sir.

Q. Now, that freight was added in the case of a retail purchaser to what—

A. I made a mistake. \$130.00 freight.

Q. A hundred and thirty?

A. Hundred and thirty, yes.

Q. That freight was added, in the case of a retail purchaser, to what figure? [165]

A. You mean on to the list price of the car? I didn't quite get the question.

Q. For instance, you testified that the cars at retail sold for eleven seventy-five, that is, to a retail purchaser?

A. No, I told you it would a hundred and twenty-five added on. I was thinking of thirty dollars profit. Hundred and twenty-five added on to the retail, yes.

Q. Did this figure of eleven seventy-five for Fours include the freight? A. Yes, sir.

Q. Mr. Harmon, can you testify from memory to exactly the different items of expense which would have been incurred by the company in selling these cars had the contract been continued?

A. Why, that would be pretty hard. There is some items that I would probably overlook; but the most important ones of course I would remember.

Q. Would it be possible for you to do so, do you think?

A. The most important ones, anyhow, yes.

(Testimony of F. E. Harmon.)

Q. Well, now, did you have a rent to pay up there?

A. Yes.

Q. What was that rent per month?

A. It was \$225.00.

Q. Mr. Thornton, I believe, was in your employ?

A. Yes, sir.

Q. What was his salary per month?

A. Hundred and fifty.

Q. Who did you have in the shop? Was there a man there by the name of Ed?

A. Yes, there was different men in the shop at different [166] times. The last man that was in the shop was—

Q. How much did he draw?

A. Eighty dollars a month.

Q. Did you have another employee by the name of—

A. Yes.

Q. What was his duty?

A. Well, he washed cars. He was really a porter and washed the cars, washed the demonstrator and outside cars and such as that.

Q. What salary did he get?

A. Why, he got sixty dollars.

Q. Did you have another employee by the name of—

A. Yes.

Q. What was his duty? A. He is a mechanic.

Q. What salary did he get? A. Sixty.

Q. Did you have a man in your employ by the name of Lynch? A. Yes.



(Testimony of F. E. Harmon.)

Q. What was his duty?

A. He looked after the stock and worked in the office and such things as that, you know.

Q. What salary did he draw?     A. Sixty-five.

Q. Did you have a light bill up there, the monthly light bill?     A. Yes.

Q. Do you recall what that was a month?

A. Oh, that would vary from, say, ten to twenty dollars a month. I would strike an average around about fifteen dollars. [167]

Q. Did you have a telephone in the place?

A. Yes.

Q. What was your monthly rate?     A. \$9.50.

Q. Did you have any towels or toilet supply up there?     A. Yes.

Q. What was the cost of that per month?

A. One dollar per month.

Q. Have any long-distance telephone calls?

A. We used to have considerable long distance telephone calls, but some of them were in this way: If a customer came in and wanted parts, and wanted them immediately, and didn't have them on hand, and wanted us to get them right away, we would long distance to Portland, and we used to run our bill up considerable, but we in turn charged it to the man who wanted the parts, so there was no loss on that.

Q. Were there any long distance telephone calls the company had to charge to itself?

A. Oh, around about five dollars a month, something like that.

(Testimony of F. E. Harmon.)

Q. Were there any telegrams the company had to send out which were chargeable to the company?

A. I suppose so.

Q. About what would they run per month?

A. Well, they would vary.

Q. What would be a fair average?

A. You might say five on that.

Q. Was it necessary to carry any insurance?

A. Yes.

Q. About what would that run a month?

A. Oh, I should judge—let me see—about thirty-five, [168] something like that.

Q. From the 22d of February on to the 31st of July would the company, in the ordinary prosecution of its business, have done any advertising?

A. Why, yes.

Q. About what amount per month would you say would have been necessary?

Mr. IVEY.—I object to that, your Honor please, as incompetent, and immaterial.

The COURT.—Let him answer.

By Mr. HALVERSTADT.—(Q.) About what amount would you say, Mr. Harmon?

A. About fifty dollars a month.

Q. Would the Harmon Motor Car Company have been under any necessary expense in the way of demonstration during this period? A. Oh, yes.

Q. About what would be a fair average monthly cost of that expense?

A. Oh, I should judge about a dollar a day, something like that.

(Testimony of F. E. Harmon.)

Q. Dollar a day, thirty dollars a month. Now, then, you recall anything else that would enter into expenses along the line that I have been mentioning here aside from salesmen, actual salesmen's commission?

A. Well, there possibly would be, maybe, some little things. Wouldn't be anything to any great extent.

Q. Now, what per cent was Mr. Thornton working under, what rate?

A. Three per cent. [169]

Q. Three per cent on what, on both models?

A. Of the net—I mean of the list price of the car f. o. b. factory.

Q. Now, did you have any other salesmen at the time you left, and would other salesmen have been necessary during the balance of the season aside from Mr. Thornton? A. Yes, probably one.

Q. How many? A. One.

Q. Probably one. What commission, if you know, was he getting? A. Well, we paid five per cent.

Q. Now, do you recall any other expenses which would have been necessary or incidental to the selling of these cars had the contract been continued?

A. You are speaking of the—

Q. That is, of the expense of selling these other cars, the forty-three cars which were still left?

A. There would have been very little expense, except there would have been a little service on them.

Q. What would you say would be a fair cost for service?

(Testimony of F. E. Harmon.)

A. Probably a hundred dollars a month, is probably what our service man would cost us and his assistant.

Q. Now, can you think of anything else which would go in that same category?

A. No, I can't say as I do.

Q. All right. Now then, get in the class of receipts. Was the company selling any parts, and did it have any parts on hand for sale?

A. We had a very large stock of Interstate parts we used to sell quite a considerable of. [170]

Q. A demand for them? A. Yes.

Q. What was the fair monthly average profit to the company, if any, on the sale of parts?

Mr. IVEY.—I don't believe that has anything to do with those contracts.

The COURT.—I don't see the theory, Mr. Halverstadt, of the inquiry.

Mr. HALVERSTADT.—(Q.) Let me ask you this, Mr. Harmon: Did or did not the sale of parts reduce the overhead expense in selling these cars?

A. Why, yes.

Mr. IVEY.—Object to that question, your Honor. That doesn't have anything to do with it.

Mr. HALVERSTADT.—I will put this question, which will probably remove the objection:

Q. Would it have been possible for the Harmon Motor Car Company, as it was then situated in its premises, to continue the sale of parts without the sale of cars at any profit?

Mr. IVEY.—Object to that, your Honor, because

(Testimony of F. E. Harmon.)

if it wasn't possible it was no fault of ours.

The COURT.—Sustained.

By Mr. HALVERSTADT.—(Q.) Mr. Harmon, can you tell us approximately what would be the cost of selling these cars, the net cost to the company, of selling these cars during the period from March 1st, 1915, from the expiration of the contract, to July 31, 1915?

Mr. IVEY.—Object to that, your Honor. If he can testify what was the cost of selling other cars he may do so. [171]

Mr. HALVERSTADT.—Now, it seems to me counsel is in an inconsistent position. He takes the position, as I understand, that we may not show to the jury the different items which reduces the gross overhead cost of selling these cars, and at the same time takes a position that we can't show the net overhead expense which would have occurred in selling these cars. That, as I conceive, is the force of his objections.

Mr. IVEY.—No, you misunderstand me, I think, Mr. Halverstadt. I object to the witness testifying what would have been the cost. He can testify as to what was the cost of something else, if that is material, but what would have been the cost here he doesn't know.

Mr. HALVERSTADT.—All right.

Q. Mr. Harmon, basing your answer on what you had theretofore learned and what you then knew at the time you left the company of the cost to the company in selling forty-three cars under conditions as

(Testimony of F. E. Harmon.)

they existed from the 22d of February, 1915, to the 31st of July, 1915, what, in your opinion, would have been the cost to the company of selling forty-three Reo automobiles of the 1915 model at retail?

Mr. IVEY.—My objection goes to that, of course, your Honor, for the same reason stated a few minutes ago. He is now testifying what would have been the cost of selling some machines.

The COURT.—He may answer what was the expense of selling a car under the circumstances.

Mr. IVEY.—I thought that is what he went over these figures a few minutes ago for, to give us some facts from which [172] we could deduce the cost. I think, your Honor, that just the statement that it cost \$25.00, or \$30.00, or something like that, to sell a car is a conclusion; it would seem to me to be. I think that would strike a business man as a conclusion, because a man would want to know what they mean by \$25.00 to sell the car. If he was a business man at all he would ask, Well, how do you figure that? It might cost one man \$25.00 and cost another man \$150.00

The COURT.—He may answer.

Mr. IVEY.—Note an exception.

Mr. HALVERSTADT.—Read the question, please.

Q. (Question repeated.)

The COURT.—Not what is your opinion, but what was the cost?

Mr. HALVERSTADT.—All right.

Mr. IVEY.—I think, your Honor please, Mr. Hal-

(Testimony of F. E. Harmon.)

verstadt and your Honor, too, might all misunderstand one another. I am objecting to the witness testifying as to what something would have cost that hasn't yet taken place.

The COURT.—I understand.

Mr. IVEY.—All right. Note an exception.

By Mr. HALVERSTADT.—(Q.) What would have been the cost?

A. Oh, I should judge around—that's pretty hard to answer now. Be around, I should judge—I must admit I am not stating from memory or anything like that, I am stating basing my figures on previous reports and what we had done previously. Be around about—

Q. Now, Mr. Harmon, I will call your attention to one of the sheets of this Plaintiff's Exhibit "13," and I will ask you whether you can take that memorandum and from it tell just what this cost would have been? [173]

Mr. IVEY.—I will object to that for the same reason I have objected before to the witness referring to this memorandum which is made up for this purpose. He is a professional, your Honor, and been in this business for ten or twelve years, testified he could tell how much it would have cost to sell them.

The COURT.—If he knows he can tell. If he can look at that paper and have his memory refreshed so as to be able to testify from memory he may do it.

By Mr. HALVERSTADT.—(Q.) Mr. Harmon, looking at the sheet which you have in your hands can you, by referring to that sheet, refresh your

(Testimony of F. E. Harmon.)

recollection so you could state to this jury the cost which we have been speaking of? Answer yes or no.

A. Yes.

Q. So referring to it refresh your recollection and state what would be the cost to the company of selling forty-three automobiles during the period between February 22, 1915, and July 31, 1915, on conditions as they then existed?

Mr. IVEY.—Your Honor please, in order that we may all understand one another I object to the witness answering that question for several reasons. The first is that no proper foundation has been laid for the witness using this document, and none can be laid so far as the record shows. And secondly, when he takes this document with a great number of figures on it and makes a statement that from his examination of this document, because that is what it amounts to, he concludes that it would cost the Harmon Motor Car Company a certain number of dollars [174] to sell forty-three machines, I say to your Honor that testimony would be an absolute conclusion, it would be incompetent, no foundation laid for it, and it would be very improper.

The COURT.—There is no use to argue. I have already stated he can't take that paper and read from it, but he can look at it and have the original transaction come back to his mind so he can testify from memory. You can look at it and have your memory refreshed so you can testify from it, but you can't read from it.

By Mr. HALVERSTADT.—(Q.) Can you answer



(Testimony of F. E. Harmon.)

under the instructions the Court gave you?

A. Yes.

Q. After looking over that statement (Plaintiff's Exhibit "13") does it refresh your recollection so that you recall distinctly the amount of that cost?

A. Yes.

Q. All right, sir, state the amount of the cost.

A. Around about sixty-one hundred dollars.

Q. Now then, at the same time this cost was being incurred by the company was there anything which the company could do only if it had these cars to sell which would reduce this cost?

Mr. IVEY.—I object to that, your Honor please, as calling for a conclusion and being immaterial. I can't follow this. We have a contract here, and it seems to me we should introduce evidence in regard to something in that contract.

The COURT.—Objection sustained. He testified to what the cost would be, and now he is asked what could be done to reduce the cost. That is entirely speculative. [175]

By Mr. HALVERSTADT.—(Q.) What had the company been in the habit of doing during the entire time it was in business, and which it was then carrying on, which did, in fact, reduce the cost of selling automobiles?

Mr. IVEY.—Well, that is a double question. Your Honor sees there is two questions in one.

Mr. HALVERSTADT.—I will withdraw that and put it this way, then:

Q. During the time the Harmon Motor Car Com-

(Testimony of F. E. Harmon.)

pany had been in business did it do anything which did, in fact, reduce the cost that you have mentioned here to the company?

Mr. IVEY.—I object to that question being answered for the reason that would have no bearing on this company so far as I can see.

The COURT.—The objection is sustained. He was asked to state a moment ago what was the cost to the company in the sale of these several cars, or other cars under the same circumstances. He stated. Now then, he is asked to state what the company could have done to reduce the cost. Now that isn't consistent with the other answer. That is supposed to be included in the other answer.

By Mr. HALVERSTADT.—(Q.) Mr. Harmon, deducting everything which did, as a matter of fact, reduce the cost of selling these automobiles, tell me what would have been the cost to have sold these forty-three machines?

Mr. IVEY.—Object to that your Honor please. That was covered by his former answer.

The COURT.—If there is anything he didn't consider in the former answer he may state it now.

The WITNESS.—I didn't get the question.  
[176]

Mr. HALVERSTADT.—Read the question, please.

(Question repeated.) Now, is there anything which you didn't consider before in stating the cost to be sixty-one hundred dollars?

(Testimony of F. E. Harmon.)

A. You mean is there anything which should be added on to that?

Q. Added to or deducted from it.

A. There is nothing that I can recall in my mind.

Q. Very well. Then I will put it this way: What would the company have had to pay out in dollars and cents from the period beginning February 22, 1915 and expiring July 31, 1915, to have sold these forty-three automobiles?

Mr. IVEY.—I think the witness has answered that, your Honor please. He said \$6,100.00.

The COURT.—I understand that he has answered it. That is really the same question that has been asked and answered.

Mr. HALVERSTADT.—Your Honor, in looking up the authorities last night I find I will have to make an offer of testimony if I want—

The COURT.—Proceed.

Mr. HALVERSTADT.—We offer to show by this witness—

Mr. IVEY.—I object to this offer being made, your Honor, in the presence of the jury.

The COURT.—You may be excused from the courtroom, gentlemen of the jury, for a few minutes.

(Jury retires.)

Mr. HALVERSTADT.—Now, so the Court will understand the situation, I will make this very brief explanation: These items of disbursement which Mr. Harmon testified to, and which I may say for the court's guidance amount to \$790.00 a month, the Court will recall included shop [177] employees,

(Testimony of F. E. Harmon.)

and so on, to whom was paid a salary. Now, as a matter of fact, the company was charging customers for the work which was done by those men, and the company made a profit on the salary which was paid these men. Now, the same is true of other matters here. For instance, the company, if it had a contract for the sale of cars, could engage in the sale of parts with profit, but if it could not have the cars to sell it couldn't make any profit because its overhead would be entirely prohibitive. They further go ahead and sell accessories for the same reason and make a profit. They also wash and polish cars and make a profit; they also store cars and make a profit. Now, the matter which Mr. Ivey apparently doesn't appreciate is the fact that the six thousand dollars, which we have figured out in detail, includes a number of monthly disbursements which were necessary in order to conduct the business to sell these cars, but that as against those sums there are certain profits which should be deducted so that we may have the net expense which we would have incurred in selling these cars. Now, that is the situation. Now, for that purpose I offer to show by this witness that in the detailed list of the monthly disbursements which this witness testified to were included salaries of employees who were engaged in doing work for customers, and on whose work the company made a profit from the customers. Will you make your objection to that?

Mr. PILES.—Let me explain this, your Honor. This man testified that it cost \$6,100.00 to run that

(Testimony of F. E. Harmon.)

business. He received back in the course of running the business [178] something over three thousand dollars. That's what we want to show and have deducted from the \$6,100.00. In other words, the net cost of running this business was \$6,100.00 minus \$3,100.00, we will say, or \$3,000.00 in place of sixty-one hundred. The man has got himself mixed, that is all there is to my mind about it; and when he answered the cost of conducting the business was \$6,100.00 he meant that minus \$3,000.00, according to this statement, and that's what Mr. Halverstadt is trying to get the witness to testify to.

Mr. IVEY.—Your Honor please, I certainly think that the witness was given more than an opportunity—

The COURT.—I thought the witness was given every opportunity—

Mr. PILES.—Yes, but he doesn't understand it; he is mixed.

The COURT.—(Continuing.) —of stating fully in detail just what the expense was. That was my purpose.

Mr. HALVERSTADT.—Now I will make my offer again. I offer to prove by this witness that in the detailed list of expenses which he gave, which approximate \$790.00 a month, or during the five months period \$3,950.00, were included salaries of employees who were engaged, among other things, in doing repair work and washing and polishing cars for customers, on whose work the company made a profit, and that that profit should be deducted

(Testimony of F. E. Harmon.)

from the itemized list of disbursements which he made in order to determine the cost to the company, the net cost to the company of selling these cars. Now, make your objection to that specific offer.

Mr. IVEY.—I object to that for the same reason that I objected before, your Honor please, on the ground the [179] witness has had ample opportunity, and has stated specifically, after considering it very carefully, that \$6,100.00 was the cost of selling these machines. Now these other things that were done there that counsel wants to use to lower the \$6,100.00 half that were some of the things that presumably have to be done around those garages anyway; and, of course, now if we ask this witness how much he would have to knock off he would say \$3,000.00 I reckon.

The COURT.—I think we are simply consuming time. I have stated already, and did a while ago, the witness was given the opportunity, and the offer is unnecessary, because, as I indicated before the jury retired and before the offer was made, if there was anything he wanted to say or to take from the amount that he had given here he should state it.

Mr. HALVERSTADT.—May I renew that question when the jury is brought in?

The COURT.—Why yes, I have given him every opportunity. Call in the jury.

(Jury recalled.)

By Mr. HALVERSTADT.—(Q.) Mr. Harmon, in stating a moment ago that the cost of selling these cars would have been about six thousand dollars, was

(Testimony of F. E. Harmon.)

that gross or net cost?

A. That was gross cost of overhead of the place and of the cars, too.

Q. Answer yes or no, are there any items or any amounts that should be deducted from that gross cost in order to determine the cost to the company of selling these cars?

A. There would be a gross cost of overhead, of course, on [180] "parts" sales and stuff like that, on garage stuff and such as that.

Q. Then what would be the actual cost to the company at the end of the season; how much money would the company have paid out at the end of the season over and above all its receipts for the sale of these cars?

Mr. IVEY.—Object to that your Honor please, as being a conclusion and speculative. I believe your Honor has ruled against me already on something similar to that, but I make this objection to save whatever rights I can.

The COURT.—If there are any item or items he desires to deduct from the expense already given, why, let him give it.

By Mr. HALVERSTADT.—(Q.) Now, are there any items which should be deducted from that six thousand dollars?

A. Well, there would be what you might call the profit of the place which could be deducted from our overhead.

Q. All right, what does that amount to?

A. Approximately three thousand dollars.

(Testimony of F. E. Harmon.)

Q. So that the cost to the company of selling these cars would be what?

A. Around about three thousand dollars.

Q. Mr. Harmon, are you under subpoena here in this court?     A. Yes, sir.

Q. By whom were you subpoenaed?

A. Northwest Auto Company.

Q. The what?     A. Northwest Auto Company.

Q. The defendant?     A. Yes, sir.

Mr. HALVERSTADT.—I believe that is all for the present. [181] You may cross-examine, and I would like, if I may, if I have overlooked something to recall him later.

Cross-examination.

(By Mr. IVEY.)

Q. You were subpoenaed to bring some books with you, weren't you?     A. Yes, sir.

Q. You brought those books, did you?     A. Yes.

Q. Mr. Harmon, you said you had been in the automobile business for quite a while, did you?

A. Yes, sir.

Q. Is it now your contention that the cost of selling an automobile such as the Reo is about that fractional part of a hundred dollars as is represented by forty-three—I will put it this way—is  $\frac{1}{43}$ d of three thousand dollars?     A. How is that?

Q. Is it your contention that the cost of handling Reo machines, or machines of that type, price and grade, and so forth, costs only  $\frac{1}{43}$ d of three thousand dollars?

Mr. HALVERSTADT.—I will object to that ques-



(Testimony of F. E. Harmon.)

tion unless it is limited to the conditions as they existed and the situation that this company was in at that particular time.

Mr. IVEY.—I will limit it to that location.

The COURT.—Let him answer.

A. If you have gone through the worst part of a season and spent the biggest amount of what your expenses would be to sell an article, and have done the heaviest part of your advertising, and would bring it right up to the [182] immediate season, and you only had a few months in which your overhead wouldn't be any larger than it had been previous, and you could wipe off, say practically two-thirds of the expense of selling—

Mr. IVEY.—Move to strike all this answer out, your Honor, as not responsive.

The COURT.—Let him answer. Let it stand.

A. (Continuing.) Well, where we get the basis of that and where I make that statement it would cost that much, is because the blank months of the season had been gone through, and I only figure on the four or five best months of the year when those cars could be sold. That is why I base that. If I had to put in the other seven months overhead, why, then the cost would *have a great deal greater*, but that had been already paid; that isn't considered in that statement at all.

By Mr. IVEY.—(Q.) What does it generally cost to handle an automobile about that size and type and price?

Mr. HALVERSTADT.—That is immaterial, your

(Testimony of F. E. Harmon.)

Honor, unless they limit it to the unexpired term of this contract and under the conditions as they existed.

Mr. IVEY.—I want to test his veracity and his credibility and his knowledge of these things generally.

The COURT.—Let him answer.

A. It would depend all together on the condition.

By Mr. IVEY.—(Q.) It would depend altogether on the condition. Now let's go back to the first part of your testimony. Did you say that the Harmon Motor Car Company sold in the year previous to the entering into this contract with the defendant company a hundred and thirty-three cars? [183]

A. Yes, sir.

Q. How much commission did you get on each one of those cars?

A. It varied the different makes of cars.

Q. What kind of cars was it you were selling?

A. They were Reo, Lozier, Interstate, Grand.

Q. And what? A. Grand.

Q. Do you know about how many of each one of those kind you sold? A. Fifty-six Reos.

Q. Sixty-six Reos? A. Fifty-six.

Q. How many Loziers? A. Thirteen.

Q. How many Interstate? A. Twenty.

Q. And how many Grands? A. Forty.

Q. What was the commission on the Reo then?

A. Twenty-two and a half per cent.

Q. Twenty-two and a half per cent of the gross price, two hundred and twenty-five dollars. Was it a thousand dollars at that time?

(Testimony of F. E. Harmon.)

A. No, it was eleven seventy-five at that time.

Q. Well, your gross commission, then, on the Reos were about a little over two hundred and twenty-five, weren't they? A. I couldn't say exactly.

Q. Twenty-two and a half per cent of eleven seventy-five?

Mr. HALVERSTADT.—That is a matter of computation.

By Mr. IVEY.—(Q.) Is it twenty-two and a half per cent of [184] eleven seventy-five?

A. Yes.

Q. I see. Are you sure you got the commission on the eleven seventy-five or on the ten-fifty?

A. Are you speaking of '14 or '15?

Q. I am talking about '14 now; I am talking about the year immediately preceding the year that you had this contract with the Northwest Auto Company?

A. In 1914 the list price was eleven seventy-five; in 1915 it was ten-fifty.

Q. Now, how about those Loziers; what was the selling price of those?

A. You are taking on that Reo, that is factory list.

Q. I am talking about the year, now October, 1913, and October, 1914.

A. Factory list was twenty-one hundred and thirty-two fifty.

Q. There were two prices, were there?

A. Yes, sir, a Four and a Six.

Q. What per cent did you get on those?

A. Twenty and five on the Six.

(Testimony of F. E. Harmon.)

Q. Twenty-five per cent? A. Twenty and five.

Q. Oh, twenty and five. Were there about the same number of twenty-one hundred machines sold as there were the thirty-two fifty?

A. There was eight 2100 and five 3200, 3250.

Q. Now the Interstates, how about those? How much did they sell for? A. Twenty-four.

Q. How many at twenty-four? [185]

A. The exact details I would have to look up on the Interstates.

Q. How is that?

A. I would have to go through and look up to be sure.

Q. Just approximately?

A. Approximately how many?

Q. Yes.

A. I tell you, I simply went over the names when I figured that out, I simply took the names—

Q. What was the price of the other kind?

A. Twenty-four hundred, twenty-seven fifty, and thirty-four hundred.

Q. Now, how much per cent did you get on that; what was your commission on that?

A. That varied.

Q. What was it?

A. From twenty-five per cent on up to twenty-five, five and five.

Q. Twenty-five up to five, five. Now the Grands, what were the selling price of those?

A. The principal amount of Grands were sold wholesale, and we got—I think it was five per cent

(Testimony of F. E. Harmon.)

on our wholesale business and ten per cent on our retail.

Q. Five per cent on wholesale and ten per cent on the retail. What was the selling price of those Grands? A. Five fifty.

Q. \$550.00. Now, if I understand you correctly, during that year you sold fifty-six Reos, thirteen Loziers, twenty Interstates and forty Grands at the prices you gave, you receiving on the Reos twenty-two and a half per cent commission; on the Lozier, twenty per cent commission; [186] on the Interstates, twenty-five plus some small fraction; and on the Grands, ten and five—I mean ten per cent on some of them and five per cent on the others, ten per cent on the retail and five per cent on the wholesale?

A. Also four Reo trucks.

Q. Yes. Now, did it cost you any more to sell those machines per machine during that year than it would have cost during the year from 1914, October, 1914, to October, 1915?

A. Yes, several times as much.

Q. Well, what would that extra cost amount to?

A. Why, with the Lozier, which was the car—the car in 1913 was such a lemon that all the owners were disgusted with it; the car had caused no end of trouble; there was hundreds of dollars of parts we had to replace; in fact, thousands of dollars of parts we had to replace on the cars; the agency had been shifted from one place to the other four or five different times, and naturally that hurts a car; and, as I say, the 1913 car had been very unsatisfactory, with

(Testimony of F. E. Harmon.)

everybody knocking it, and it simply meant we had to stretch a few points in order to sell it. And the Reo was a good deal the same way. The Reo had been very poorly represented here for some time, at least they hadn't done very much with it, and the territory hadn't been looked after much, there hadn't been hardly any cars placed in the territory or anything, and consequently it took a good deal of money to build it up.

Q. You had to build up the Reo?

A. Yes, sir.

Q. You had it built up very nicely. About what is the net profits on the gross volume of business in the average [187] automobile business in Seattle? Do you know what I mean?

A. Yes, I know what you mean.

Q. All right, what is it?      A. The average?

Q. Yes.

A. You have got a question there that is rather hard to answer. I don't think you can strike an average.

Q. Well, what, in your opinion, is approximately the average? How much per cent did you make, for instance, for the preceding year, put it that way? I will get it even narrower than that. What per cent did you make during that year you are just talking about, I mean the year in which you sold a hundred and thirty-three cars?

A. Positively I couldn't answer.

Q. Do you know what per cent you made?

A. I do not know.

(Testimony of F. E. Harmon.)

Q. How much money did you make during that year?

A. I couldn't state that positively either.

Q. Never thought to figure that out? A. No.

Q. Did you make any?

A. Yes, I made money.

Q. How much? You have some idea? Would your books show?

A. Our books wouldn't show positively, no.

Q. What do you keep in those books, the amount it is worth and the stock you have on hand, and so forth?

A. No, we don't keep our cars in that book. In other words, it would be impossible for me to say just definitely what it would have been, what our profits would have been that year. [188]

Q. Did you run your business in such a manner you could run out at any time your present worth?

A. We couldn't figure out at any time what we were worth?

Q. Yes. A. No, we did not do that.

Q. Could you at any time figure out what your business was worth? A. Approximately, yes.

Q. Could you take your books now—

A. Our books wouldn't show it.

Q. Could you take your books and your recollection, your information about the business, and determine that? A. Not that long ago, no.

Q. Well, to come back to this other account, then. What is your opinion about the per cent I was speaking of a while ago of the volume of business that is

(Testimony of F. E. Harmon.)

made in the average automobile business here in Seattle?

Mr. HALVERSTADT.—I haven't objected, your Honor. It seems to me that is objectionable as incompetent, irrelevant and immaterial as to the issue here in this case.

Mr. IVEY.—I am going to show, your Honor, this witness has no idea at all.

The COURT.—Let him answer.

Mr. HALVERSTADT.—Exception.

By Mr. IVEY.—(Q.) What is it?

A. I will admit that I don't know, and I don't think anybody else can answer.

Q. Do you know what any automobile dealer in this town, what per cent any automobile dealer in this town, has made on the gross volume of his business at any time since you [189] have been in Seattle for any particular year?

A. Do I know?

Q. Yes. A. I can't say that I do.

Q. How long did you say you had been in the automobile business?

A. About six or seven years.

Q. Did you ever at any time figure out how much you made? A. Absolutely.

Q. You did figure it out? A. Yes.

Q. When was it?

A. Oh, you mean how much I had made all the time, all the years, or what?

Q. For a year?

A. I don't know as I ever did; no.



(Testimony of F. E. Harmon.)

Q. You don't know what it is?

A. No, never did.

Q. All right. Oh, Mr. Halverstadt, was this witness or Mrs. Harmon going to figure out the standing of the company from the beginning?

Mr. HALVERSTADT.—She.

By Mr. IVEY.—(Q.) Mr. Harmon, prior to the cancellation on our part of this contract did Mr. Vogler come up to see you?

A. I guess he did.

Q. Do you remember when that was?

A. He was up several times. You mean just very—not very long before it was cancelled, or what do you mean?

Q. I mean in the month of February, I think it was, he came up to see you in response to a telegram you sent him? [190] A. Yes, sir.

Q. You remember sending him this telegram?

A. I do.

Q. That telegram, this one that I now hand you, bearing date February 2d, I think, I think that's the 2d, is that the telegram? A. I did.

Mr. IVEY.—Mr. Halverstadt, this is that telegram, I believe. I offer this telegram in evidence.

Mr. HALVERSTADT.—Now, if the Court please, I want to make an objection here, and in order to make it intelligently I will have to ask counsel for what purpose he is offering it at this time. Probably save time in doing it. To prove that affirmative matter in your complaint?

Mr. IVEY.—Have this witness admit now that we

(Testimony of F. E. Harmon.)

cancelled this contract.

Mr. HALVERSTADT.—Very well. That is a part of the affirmative matter which is pleaded, and it is not cross-examination of this witness, not proper cross-examination; he was asked nothing of that on direct examination.

Mr. IVEY.—Counsel's objection may be well taken, your Honor. I made the offer.

The COURT.—Sustained.

Mr. IVEY.—I don't think I have any further questions to ask him at this time.

Redirect Examination.

(By Mr. HALVERSTADT.)

There is one question I think probably I overlooked asking this witness on direct examination. Have you any [191] objection to my doing so now?

The COURT.—Proceed.

By Mr. HALVERSTADT.—(Q.) What was the gross profit the company would have made in selling the forty-three cars if the forty-three cars that were sold had been delivered by the Northwest Auto Company?

Mr. IVEY.—Calling for a conclusion, your Honor please, and object to it. Immaterial anyway.

Mr. HALVERSTADT.—I would like merely to make this suggestion to the Court. If it is going to be as hard for the jury to sit down and figure out what these amounts are as it was for us last night, to get them absolutely accurate, it can't be done.

(Testimony of Mrs. Gertrude Harmon.)

The COURT.—Well, then, you haven't got it right.

Mr. HALVERSTADT.—It involved taking into consideration so many different elements.

The COURT.—If you have got it right then the jury can get it right.

Mr. HALVERSTADT.—All right. Exception. That is all.

(Witness excused.) [192]

**Testimony of Mrs. Gertrude Harmon, in Her Own  
Behalf (Recalled).**

Mrs. GERTRUDE HARMON, the plaintiff, recalled as a witness on her own behalf, further testified as follows:

Direct Examination.

(By Mr. HALVERSTADT.)

Q. Mrs. Harmon, Mr. Ivey asked you yesterday just before you left the stand whether you would go through the books and make for him a statement of the assets and liabilities of the Harmon Motor Car Company as of date of January 1st, 1914, and of date of January 1st, 1915. Did you attempt to do so?

A. Yes, sir, I did.

Q. Were you able to do so?

A. No. I worked for about four hours and I couldn't come to any—

Q. Now, state why you could not.

A. Well, for the simple reason that the company didn't take inventory, and the books, the way those books are they don't show Accounts Payable.

(Testimony of Mrs. Gertrude Harmon.)

Until a bill is paid it isn't in the books, and when it is paid of course it is not a liability. And on that statement I would have had to give the liabilities, and that would have been the accounts payable at that time, and they don't show in that set of books. The first set of books was opened by Mr. McKenna's bookkeeper, who was a bookkeeper for an advertising firm, and I don't believe he realized what system he should put in for an automobile agency; and after they had run on for about a year and a half I realized they were very inefficient, and we put on a bookkeeper whom Mr. Vogler sent up to us and recommended [193] as an old automobile bookkeeper, but his books looked to me as though they are not any more clear than the other book, and a whole lot more red tape to it. It seems it takes you an hour to get at it, and then you don't get anything. I kept the books there, but I am not an expert accountant. The way those books are I don't see how anyone could make a statement of what the assets and liabilities were of this company as far back as that; you *would* to depend entirely on you memory for it.

Mr. HALVERSTADT.—Now, if counsel desires these books we will be glad to let him have the books.

Mr. IVEY.—Which is the books from which you tried to figure?

The WITNESS.—All of those books there. There are two separate sets.

Mr. IVEY.—I would like to consider counsel's proposition, your Honor.

The COURT.—Proceed.

(Testimony of Mrs. Gertrude Harmon.)

Mr. HALVERSTADT.—That is all.

Mr. IVEY.—That is all.

(Witness excused.)

Mr. HALVERSTADT.—Plaintiff rests.

PLAINTIFF RESTS HER CASE IN CHIEF.

Mr. IVEY.—Your Honor please, I want to present a motion which the jury, I presume, will not be interested in at all. [194]

The COURT.—You may be excused until two o'clock, gentlemen of the jury.

(Jury retires.)

Mr. IVEY.—The motion, if your Honor please, that I desire to present is one for a nonsuit upon the grounds that plaintiff's evidence has failed to show that they are entitled to recover at all; and in addition thereto has shown that they are not entitled to recover, that is, the plaintiff in this case.

After argument the Court announced its ruling as follows:

“The COURT.—The motion in any event must be denied.”

to which ruling the defendant excepted and the exception was allowed.

(Jury recalled.) [195]

**Testimony of F. W. Vogler, for Defendant.**

F. W. VOGLER, produced as a witness on behalf of defendant, and having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. IVEY.)

Q. Mr. Vogler, where is your residence?

(Testimony of F. W. Vogler.)

A. Portland, Oregon.

Q. What relation, if any, do you bear to the defendant company?

A. I am president of the company.

Q. This is a Portland concern, is it?

A. It is a Portland, Oregon, company.

Q. Yes. Did you have anything to do with the making of this contract that is described in the plaintiff's complaint, which is on file here as some exhibit, I have forgotten which one, it is the one in this case, anyway. A. Yes.

Q. Did you negotiate with the Harmon Motor Car Company for the making of it? A. Yes.

Q. Which particular party of the Harmon Motor Car Company was it that you negotiated with?

A. F. E. Harmon.

Q. F. E. Harmon? A. Yes, sir.

Q. That was the witness that was on the stand this morning? A. Yes, sir.

Q. Well, were any representations made to you with reference to the nature of this company, as to whether or not it was a corporation or a copartnership?

Mr. HALVERSTADT.—Just a minute. Object to that, your Honor, [196] for the very apparent reason that there is no pleading in here which justifies any inquiry into that question whatever. Now, here is the only thing which is plead concerning it. This is found on the second page, the first paragraph of the first affirmative defense:

“That at the time the contract, Exhibit ‘A,’ at-

(Testimony of F. W. Vogler.)

tached to plaintiff's complaint was made and entered into by and between this answering defendant and Harmon Motor Car Company the said F. E. Harmon, who executed the contract for the Harmon Motor Car Company as President, represented that said Harmon Motor Car Company was a corporation, but that afterwards this defendant ascertained the fact to be that the Harmon Motor Car Company was a mere trader's name used by the said F. E. Harmon. Now, if that allegation has any purpose whatever in the action it is on the theory of a fraudulent representation; but to be actionable that representation must be made on the familiar principles we find in the books with three distinct angles to it. It must be made knowingly for the purpose of defrauding, and it actually must defraud, and it must be to the damage of the person to whom the representation was made."

The COURT.—What is your contention, Mr. Ivey, in relation to this inquiry?

Mr. IVEY.—My contention is simply this, your Honor please: We had a right to know who it was we were contracting with. Now, if this were a company of which Mr. Harmon was President, and he so stated to us, why, we should be permitted now to show that was a fact. The plaintiff said that she doesn't know what kind of a concern this [197] was, whether it was a copartnership or corporation, and I don't know right now what is going to be contended with reference to that by Mr. Halverstadt. But we did not think that it was any copartnership.

(Testimony of F. W. Vogler.)

It may be contended it was a copartnership, but I want to show by this witness that we thought it was a corporation, and subsequently we discovered, or we were advised, rather, that it consisted in Mr. F. E. Harmon himself.

(Argument.)

The COURT.—I haven't examined into it, but I don't see now that it is material at all under the issues. It may be in the course of the examination of this witness, when you get to the cause of the cancellation, that this might become material, but at this time I don't think it is.

Mr. IVEY.—It is merely laying the foundation, your Honor, please, for subsequent conversations with Harmon himself.

The COURT.—Let's get to that in the proper way.

Mr. IVEY.—All right.

Q. After you executed this contract when was the next time you came to Seattle, Mr. Vogler, if you recall, just approximately?

A. Oh, I usually came perhaps once a month, or once in six weeks, every six weeks, stopped off on my way around through the country.

Q. I ask you, Mr. Vogler, if you got this telegram that I am handing you (showing same to witness)?

A. Yes.

Mr. IVEY.—I desire to offer this in evidence.

Mr. HALVERSTADT.—We object to it as incompetent, irrelevant and immaterial to any issue which is formed by the answer [198] in this case, because, if you will look at the latter part of the



(Testimony of F. W. Vogler.)

third paragraph of the first affirmative defense, it is expressly stated there that but for the sole fact—I will read the exact language—the defendant states to the Court:

“That had the plaintiff been able to secure the capital necessary to conduct the business, and had she been able to have carried out said contract, this defendant would have been ready and willing to have had the same carried out by her as representing the said Harmon Motor Car Company. That this defendant only terminated said contract when finally informed that neither the plaintiff nor the Harmon Motor Car Company would be able to fulfill the contract or carry it out by its terms or otherwise.”

He there has plead the reason why he terminated that contract. Now, the issue is limited to one thing. Was that a valid reason which, in law, permitted him to terminate that contract? He has, as a matter of fact, by that part of his answer expressly, or in necessary effect, plead that he waived everything which appears in the answer prior to that.

(Argument.)

The COURT.—The objection is overruled. The defendant can present his theory of the issues here.

Mr. HALVERSTADT.—Exception.

The COURT.—Exception allowed.

Mr. IVEY.—I ask that this exhibit be marked Defendant's Exhibit “B,” Mr. Clerk, because we marked another one there the other day. [199]

(Testimony of F. W. Vogler.)

Telegram referred to received in evidence, marked Defendant's Exhibit "B" and made a part of the record herein.

Q. Now, Mr. Vogler, I will ask you if you came to Seattle in response to this? A. Yes.

Q. And did you visit Mr. Harmon or not?

A. Not when I first came up, no.

Q. Who did you visit, if anybody, in connection with the Harmon Motor Car Company?

A. I went to the office where the agency was conducted and saw Mr. Harmon and Mr. Thornton.

Q. Have any conversation with them about this matter? A. Yes.

Q. Tell us what that conversation was.

A. Well, I stated why I was coming, why I came up, and asked what the trouble was—I hadn't heard anything of it at that time—and I was informed by Mr. Harmon what the trouble was.

Q. What did she say the trouble was?

A. That Mr. Harmon, in this particular case, had been out, taken a car out joy-riding, taken some women out with him and insulted them and left them on the road, and finally picked them up and brought them into town, and they complained on *his* and had him arrested and put in jail.

Q. Did you subsequently see Mr. Harmon on that same trip?

A. I saw him, I think, after—he got out after I was there four or five days, and I saw him up in my room, hotel room, one night.

(Testimony of F. W. Vogler.)

Q. Did you have any talk with him about this conduct that you said his wife told you about?  
[200]

A. Yes.

Q. What did he say about it, if anything?

A. He couldn't deny it. He said—he told me at that time he got just about what he deserved. And as far as he was concerned he was ready to leave the country; and he put the company in bad, the agency in bad.

Mr. HALVERSTADT.—Now, just a minute. We object to that on the ground it is pure hearsay as to the plaintiff, and move to strike the testimony as to what occurred between Mr. Harmon and Mr. Vogler.

Mr. IVEY.—That brings us right back to that question we had a few minutes ago.

The COURT.—The motion is denied.

Mr. HALVERSTADT.—Exception.

The COURT.—What rights the plaintiff has are predicated upon the rights connected with the witness Harmon, and the conversation would be proper.

By Mr. IVEY.—(Q.) Did you say anything to Mr. Harmon at that time about the cancellation of this contract?

A. Yes, I took it up with her and said that *they* way the conditions were surrounding the agency there would be only one thing for us to do, and that would be to cancel the contract, or make other arrangements to have different representation.

Q. What did he say as to that, what did Mr. Harmon say as to that statement of yours?

(Testimony of F. W. Vogler.)

A. Well, he said he didn't blame me for taking that view of it.

Q. Did you after that time see Mrs. Harmon?

A. After that?

Q. Yes. [201]

A. Yes.

Q. What was the occasion of your seeing her?

A. Well, I simply wanted to take it up further with her, the matter of the agency.

Q. Speak a little louder, if you please.

A. I say, I wanted to talk the matter over further with her.

Q. And what conversation, if any, did you have with her regarding the cancellation of the agency?

A. Mrs. Harmon asked me if she could continue. I told her we didn't want to work any hardship on her, and if she could show us where she could continue it we would be only too glad to allow her to continue it, but not under that name, we couldn't stand it under that name any longer, and she was perfectly willing to reorganize and get a new company and go ahead, and I told her if she could raise the money that I would consider it. And she asked me how long I would hold off, and I said a week or ten days if necessary, but I would have to do something pretty soon.

Q. And did she take any steps, or did you take any steps for her in regard to seeing if she could get this money?

A. I asked her where she thought she could raise it, and she said that she thought her mother could

(Testimony of F. W. Vogler.)

raise it for her, and I said all right, it didn't make very much difference to us where it was raised as long as the money, the necessary capital, was raised to conduct the business. I waited a couple of days and asked her about it, and there was nothing being done, and I asked her nearly every day I was there *there* what she was doing. She hadn't done anything. Then I suggested that their bank might be able to [202] do something. But I waited a couple of days and there was nothing done in the bank. I asked her if I could go and see the bank and help her out in it? She said I might.

Q. Did you go? A. I did.

Q. What was the result?

A. I saw the president—

Mr. HALVERSTADT.—Just a minute. That is pure hearsay again.

The COURT.—Sustained as to what the president said, or conversation in the absence of the plaintiff, unless this was communicated to the plaintiff.

Mr. IVEY.—I think, if your Honor please, if she sends Mr. Vogler down to the bank to make inquiries he should be permitted to state what he found out.

The COURT.—No, I don't think so.

Mr. IVEY.—I would like an exception, your Honor.

Q. Then what is the next thing that happened with reference to your negotiations with Mrs. Harmon?

A. Well, after I got the information from the bank

(Testimony of F. W. Vogler.)

that I got there I told her that I didn't think there was any show for her—

Q. You went back and told her there wasn't any show for her?

A. Yes, there wasn't any show for her, after a conversation I had with the president of the bank she couldn't expect to get any help there. And I told her that it would have to be up to us to make the change.

Q. I hand you a document that is marked Defendant's Exhibit "A" and ask you if you received that telegram? A. Yes.

Mr. IVEY.—I offer that in evidence. [203]

Mr. HALVERSTADT.—Object to it on the ground it is incompetent, irrelevant and immaterial. This telegram is one that was offered the other day, and it is dated subsequent to the date of the cancellation.

Mr. IVEY.—It is the telegram that your Honor examined yesterday, and goes to show the very negotiations that the witness is testifying about now were being carried on, that is, to get another agency. It wasn't the contention that the old agency still existed, but that it was another one. I would like to have your Honor take a look at it if there is any question in your mind about it.

The COURT.—Overruled.

Mr. HALVERSTADT.—Exception.

Telegram referred to received in evidence, marked Defendant's Exhibit "A" and made a part of the record herein.

(Testimony of F. W. Vogler.)

By Mr. IVEY.—(Q.) Mr. Vogler, did you come to Seattle in response to that telegram?

A. No, I don't think I did.

Q. Why didn't you come to Seattle in response to it?

A. Well, we had made arrangements, just about made arrangements with somebody else to represent us.

The COURT.—What is the date of that?

Mr. IVEY.—That is February 24th, your Honor please, two days after the cancellation.

Q. Had you already sent out that notice of cancellation that has been talked about here, and which is in this complaint, which bears date February 22d?

A. I think we had, yes.

Q. Been sent out. Mr. Vogler, there was something said in the plaintiff's evidence about who drew this contract, [204] who prepared this contract. I will ask you to state to the jury who, in fact, does prepare these contracts that you get these agents to sign?

A. The factory who we get our cars from, the Reo factory.

Q. I will show you one of the contracts that the Harmon Motor Car Company had with one of its subagents and ask you if that, too, is one of those factory contracts?

A. Can I compare it with that (indicating)? (Handing paper to witness.) I think it is the same thing.

Q. The same contracts? A. Yes.

(Testimony of F. W. Vogler.)

Q. I believe you testified that you told Mr. Harmon that the contract was at an end. Now, if your Honor please, I think I am at this time permitted to show that Mr. Vogler thought this was a company, a corporation, of which Mr. Harmon was president, in view of the fact he dealt only with Mr. Harmon in the matter of the cancellation of the contract. I will ask that question and let your Honor rule on it. What representations, if any, were made to you at the time this contract was entered into as to what this Harmon Motor Car Company was?

Mr. HALVERSTADT.—Just a minute. We object to that for the same reason that we spoke of before. What would be the use to maintain a complaint on my part that John Jones had misstated to me a certain fact if I would be compelled to admit that John Jones never changed my opinion one particle by that false statement, or if I were compelled to admit that I knew the falsity of that statement at that time, that I didn't act on it, that it made no difference to me one way or the other? It would be an [205] utter waste of time. Now, the question isn't disposed of yet in this case, so far as I recall, was it a partnership or was it a corporation? Furthermore, the evidence clearly shows that the Harmons believed implicitly they were a corporation organized under the name of the Harmon Motor Car Company. Now, it is fundamental they couldn't deceive anybody actionably unless they did it deliberately and knowingly.



(Testimony of F. W. Vogler.)

The COURT.—Let him answer.

Mr. HALVERSTADT.—Exception.

By Mr. IVEY.—(Q.) What representations were made to you, if any?

A. They were a corporation and Mr. Harmon was president.

Q. Now, at that time, Mr. Vogler, was this note that is referred to and made a part of this contract at the time you came up here to Seattle in response to the telegram, that is, about February 2d, was this note paid up? A. It was not; no.

Q. Did you have any talk with either Mr. Harmon or Mrs. Harmon with reference to the payment of that note? A. Yes.

Q. What was said about it? Just state which one you had the conversation with?

A. Why, I rather think with both of them, what conversation I had was with both of them.

Q. Did you make a demand for the payment of the note? A. Yes.

Q. What response did they give you?

A. Well, they couldn't pay it.

Mr. IVEY.—I think that is all at present. [206]

Cross-examination.

(By Mr. HALVERSTADT.)

Q. Mr. Vogler, have you any recollection about the date in February, 1915, that you came to Seattle in response to that telegram?

A. It was that same evening. I came in on the date of that telegram, whatever it is.

Q. You left Portland on the date of that telegram?

(Testimony of F. W. Vogler.)

A. I am inclined to think I did, at 11:00 o'clock that night.

Q. But if it wasn't exactly at that time it was very, very shortly afterwards, wasn't it?

A. I think so, yes.

Q. Mr. Vogler, do you remember coming in my office in the Hoge Building on that occasion, that is, when you were in Seattle on that trip?

A. Sometime during that trip, yes, I was in your office.

Q. Now, do you remember what you asked me there? Answer yes or no.

A. I remember,—not all of it, it is nearly three years ago.

Q. Didn't I tell you fully all the facts and circumstances connected with it, that is, with Mr. Harmon's actions? A. No, sir, you did not.

Q. I did not? A. No, sir.

Q. Didn't I read to you a copy of the divorce complaint, my office copy of the divorce complaint in that case, and tell you that that was substantially all I knew, except some other little details that I told you? Isn't that a fact?

A. I don't remember it. You might have.

Q. Isn't it a fact that you and I discussed that particular [207] question?

A. The question of the—

Q. That is, the question of Mr. Harmon's actions?

A. Yes, we discussed it.

Q. Yes. And didn't I tell you then that my interest in the matter was in protecting Mrs. Harmon in

(Testimony of F. W. Vogler.)

the business up here?

A. I don't remember particularly. You might have. It might have come up in the conversation.

Q. Yes. And didn't I tell you that we had taken assignments of Mr. Harmon, of the stock that he had in the McKenna company, I mean of all his right in that company?

A. I don't remember anything of it if you did.

Q. You do not? A. I certainly do not.

Q. Let me call one circumstance to your attention and see if this will not bring it to your attention. Don't you recall my going and calling to your attention a carbon copy of this original assignment which was introduced in evidence here, this one which is marked Plaintiff's Exhibit "1"; and further, don't you recall that I told you that that instrument, the original of that instrument, had been filed in the office of the County Auditor of King County for record and had not yet been returned?

Mr. IVEY.—Your Honor please, I object.

A. I don't remember it.

Mr. IVEY.—I object to that on the theory that I mentioned to your Honor before lunch. This is not an assignable contract and would have no effect anyway.

The COURT.—Overruled. [208]

Mr. IVEY.—I would like an exception.

By Mr. HALVERSTADT.—(Q.) Don't you recall that, Mr. Vogler? A. No, I don't recall that.

Q. Now, would you say that that is not the fact?

A. Well, as far as my—

(Testimony of F. W. Vogler.)

Q. If you will please answer yes or no, then if you want to explain then do so.

A. I don't recall of having this—

Q. Please answer yes or no.

The COURT.—If he doesn't recall it I think that answers it.

By Mr. HALVERSTADT.—(Q.) You do not recall it? A. No.

Q. All right. Now, Mr. Vogler, did you not at that time say to me that you would be very glad to have Mrs. Harmon continue that agency under her own management?

A. Why, I testified that a while ago under certain conditions.

Q. I say, didn't you say that to me on that occasion when you were in my office?

A. I said that I said that to her; yes.

Q. And did you not say it to me?

A. Under the conditions that I required. I might have said it to you.

Q. Didn't you further say that Mr. Thornton being with her, and being a very efficient man, she had all the help she needed?

A. I couldn't very well say that I said that, knowing the conditions between Mrs. Harmon and—at that time I couldn't say it.

Q. But would you say that you didn't say it?

A. I don't know how I could say it knowing the conditions [209] between them.

Q. All right. And didn't you say to me that the Harmon Motor Car Company had up with your com-

(Testimony of F. W. Vogler.)

pany at that time a \$750.00 deposit, and that the cars which had been sent in were promptly paid for, that the draft attached to the bill of lading for cars which had been sent in were promptly paid for?

A. I don't remember telling you that; no, sir.

Q. Would you say that you did not?

A. Well, I wouldn't say that I would or wouldn't. I don't remember that conversation coming up. I don't know what would bring it up at that time.

Q. And didn't you tell me at that time that you were very sympathetic with Mrs. Harmon because of the fact that the cars had not been delivered to her when she needed them so badly?

A. Oh, I might have said it. I don't remember. I don't recall those things no more than I would to say anybody would be out of luck that don't get cars.

Q. Didn't you come back to my office a second time?

A. I don't remember coming the second time, no. As I remember now it was terminated at that time, the thing was decided, my opinion was given to you at that time.

Q. And didn't you tell me at that time you would let Mrs. Harmon keep that contract and continue that business?

A. Providing certain conditions were carried out, the same as I testified a while ago, and told her that I would.

Q. Very well.

A. And I also told you that it couldn't be done at

(Testimony of F. W. Vogler.)

that time, I remember that, and we decided to let it drop at that. [210]

Q. Tell me this, did you not at that same time mention the subagencies which had been created by the Harmon Motor Car Company and call attention to the number of cars which the Harmon Motor Car Company had sold?

A. I don't think so, because I don't suppose I knew. That matter comes through Mr. Clark.

Q. I don't mean definitely in numbers, but a considerable quantity?

A. That is a matter that I don't take up. That comes up through Mr. Clark. He has that information and I haven't got it.

Q. And didn't you further say to me that one of the reasons you were particularly anxious to let Mrs. Harmon have that contract and were going to let her have it was because she had—they had carried it through the dry months of the year—I don't remember the exact term you used—but that portion of the automobile year in which there were little or no sales?

A. No, sir; I don't remember of making that statement.

Q. And that having sold these cars, and the season coming right on, she was entitled to the benefit of the sales they had made?

A. I don't remember of making such a statement to you.

Q. Would you say that you didn't make it?

A. I would just as leave say I didn't as I did.

Q. Yes, sir. Now, as to these contracts, Mr. Vog-

(Testimony of F. W. Vogler.)

ler, this form of contract which Mr. Ivey mentioned to you, I believe you said that they were forms which were prepared by the factory, was that correct?

A. Yes. [211]

Q. What relation does the Northwest Auto Company, that is the defendant in this case, occupy with reference to the factory? Are you an agent, or what are you? A. We are an agent.

Q. You are an agent? A. Yes, sir.

Q. When it came to letting this contract to the Harmon Motor Car Company you, as agents of the factory and on behalf of your own corporation, insisted that that form of contract be signed, did you not?

A. I don't know as we would necessarily insist on it.

Q. That is the contract you presented for signature, is it not? A. Oh, that we did.

Q. Yes. A. Oh yes, yes; yes.

Q. In fact, that was the only form of contract that you would have let him sign, was it not?

A. Oh, we might have, under some conditions, let him sign a different form. It wasn't compulsory, I don't think, but it is the form that is used, we all use.

Mr. HALVERSTADT.—That is all for the present.

Redirect Examination.

(By Mr. IVEY.)

Q. You referred to some conditions that existed between Thornton and the plaintiff at the time you were talking to Mr. Halverstadt? A. Yes.

(Testimony of F. W. Vogler.)

Q. What conditions are those you had in mind?

Mr. HALVERSTADT.—That is immaterial, your Honor. [212]

Mr. IVEY.—I don't think so.

The COURT.—Any conditions that were communicated?

Mr. IVEY.—Yes, sir.

The COURT.—Anything you said?

Mr. IVEY.—Well, I will withdraw that question and put it this way: Did you have any talk with Mr. Thornton as to his relations with Mrs. Harmon at that time? A. Yes.

Q. Mr. Thornton was in the employ of Mrs. Harmon, of this Harmon Motor Car Company, at that time, was he? A. Yes.

Q. Well, just state why you think that you wouldn't have told Mr. Halverstadt that Mr. Thornton was a good man and would be sufficient help to Mrs. Harmon,

Mr. HALVERSTADT.—We object to that on the ground it is incompetent, irrelevant and immaterial, and plainly calls for hearsay testimony.

The COURT.—Any reason that he communicated either to Mr. Halverstadt or Mrs. Harmon he may state, but none that he has in his mind now have been communicated.

Mr. IVEY.—I think the conversation he had with Mr. Thornton, if your Honor please, in regard to the nature of this business would be permissible. Thornton was in their employ, an agent of theirs.

The COURT.—I don't think so.



(Testimony of F. W. Vogler.)

Mr. IVEY.—I would like an exception, your Honor.

The COURT.—Unless made in the presence of the plaintiff.

By Mr. IVEY.—(Q.) Did you have any conversation with Mrs. Harmon about Thornton?

A. Yes. [213]

Q. What was that?      A. The conversation?

Q. Yes.

A. Well, Mrs. Harmon—I mentioned perhaps the organization—

Q. Just speak a little louder, please.

A. In going over the matter I mentioned Mr. Thornton in connection with Mrs. Harmon, and he seemed to be very repulsive to her; she wanted nothing to do with him as a manager or wanted him around there in any capacity.

Q. Now, you said that your company was an agent for the factory. What kind of contract have you? Is your contract anything similar to the contract you have with the Harmon Motor Car Company?

A. In form, yes; it is along about the same lines, yes.

Q. One of those printed forms?      A. Yes.

Q. And that is what you mean by your being an agent of the factory?      A. Yes.

Mr. IVEY.—I don't believe there is anything further.

Recross-examination.

(By Mr. HALVERSTADT.)

One question I should have asked on cross, Mr. Ivey.

(Testimony of F. W. Vogler.)

The COURT.—Proceed.

By Mr. HALVERSTADT.—(Q.) Mr. Vogler, who were the new agents you appointed here in Seattle after you cancelled the contract?

A. The Puget Sound Motor Company; Sharpe & Leader, I believe.

Q. Did you use the same form of contract in making an agreement [214] with them that you used in making the contract with the Harmon Motor Car Company?

A. I believe it would be the same, yes, sir.

Mr. HALVERSTADT.—That is all.

Mr. IVEY.—That is all.

(Witness excused.) [215]

### **Testimony of Albert Burke, for Defendant.**

ALBERT BURKE, produced as a witness in behalf of the defendant, being first duly sworn, testified as follows:

#### Direct Examination.

(By Mr. IVEY.)

Q. What is your full name?      A. Albert Burke.

Q. Where do you live, Mr. Burke?

A. Everett, Washington.

Q. What is your business?

A. Automobile business.

Q. How long have you been engaged in that?

A. 1914.

Q. Still engaged in it?      A. Yes, sir.

Q. Do you know Mr. F. E. Harmon, who is in court?      A. I do.

(Testimony of Albert Burke.)

Q. Did you ever have a contract with the Harmon Motor Car Company?   A. I did.

Q. Under what name was it?

A. Harmon Motor Car Company.

Q. Is this the contract (showing same to witness)?  
I refer to Plaintiff's Exhibit No. 5.   A. It is.

Q. You executed that contract for your company?

A. I did.

Q. And I will ask you whatever became of that contract? Did you undertake to carry it out, or did you cancel it?   A. In the 1914?

Q. Yes. [216]   A. Carried it out.

Q. That is the 1914 contract?   A. It is, yes.

Q. Doesn't that cover cars—maybe you have got hold of the wrong one. Well, did you have another contract besides this?

A. We had a contract in 1915.

Q. What time of the year was that?

A. I don't remember that. I think it was made out just after that one, after the expiration of that one.

Q. This one was dated the 3d of December, 1914.

Q. 1914? Well, it is the 1915 contract, then.

Q. Is this the one you carried out?   A. Yes, sir.

Q. You got all your machines under this contract?

A. The 1914? No.

Q. Well, I think possibly we misunderstand one another. This is dated on the 5th of December, 1914, and calls for—

A. Twenty cars to be delivered.

Q. Twenty cars. And I want to know if this contract was carried out?   A. It was not, no.

(Testimony of Albert Burke.)

Q. Why wasn't it carried out?

A. The change in the agency.

Q. Change in the agency. Did you ever have any talk with Mr. Harmon in regard to the cancellation of this contract with his company?

Mr. HALVERSTADT.—Now, just a minute. When?

By Mr. IVEY.—(Q.) Did you ever have one with him? A. I did. [217]

Q. When was that? About when was that conversation that you had with Mr. Harmon?

A. That was some time—I think it was in February.

Q. February of what year? A. '15.

Q. What was the occasion—

Mr. HALVERSTADT.—Fix the date a little closer, will you?

Mr. IVEY.—Do you know what part of February?

Mr. HALVERSTADT.—No, I don't know.

By Mr. IVEY.—(Q.) Well, is there any incident that occurred about that time by which you can approximately determine the date?

A. Why, it was the time right after the cancellation of the contract from the Northwest Auto Company to the Harmon Motor Car Company.

Q. About what time was it, Mr. Burke, with reference— Did you know about this trouble, about getting in jail up here? A. I did.

Q. Well, what time was it with reference to that incident? A. Why, it was right after that.

Q. Right after he got in—

(Testimony of Albert Burke.)

Q. In jail, yes.

Q. Had he gotten out of jail at the time you had this conversation, or did you have it in jail where he was? A. No, he got out of jail.

Q. Do you know about how long he stayed in jail?

A. I don't know. I should judge along about two or three days.

Q. What was the occasion of your going to see him at that time? [218]

Mr. HALVERSTADT.—Just one minute, your Honor. If this is going to lead into any conversation with Mr. Harmon there is a very obvious question in regard to that. Mr. Harmon severed his connection prior to that, and anything he said would be unauthorized so far as the Harmon Motor Car Company was concerned.

Mr. IVEY.—We never considered, your Honor, please, that contract to be signed, and it hasn't been proved—

Mr. HALVERSTADT.—We haven't taken an assignment of that contract to this day, Mr. Ivey.

Mr. IVEY.—His getting out of that company was not communicated to our company, and that is just what I proved here a few minutes ago, that he was the man we were dealing with at all times, and we have, of course, the right to show what conversations were had with the principal, or the assignor, in an action by the assignee. I don't think there is any question about that. I am going to show by this witness that he cancelled this contract with F. E. Harmon when this thing happened up here in Seattle. I think

(Testimony of Albert Burke.)

I am entitled to do that.

Mr. HALVERSTADT.—This is a perfect surprise to the plaintiff, I will say that. We never knew anything about it. And I submit one of two things must appear, either that Mr. Harmon was authorized to take whatever action he did take so far as the plaintiff is concerned, or the action must have been had and the conversation carried on in the presence of the plaintiff, or it may be, third, that she later approved it.

The COURT.—He may answer the question.

The WITNESS.—What was the question? [219]

Q. (Question repeated.)

A. Because I had a deposit of \$250.00 up on my contract, and when I learned that the contract was cancelled by the Northwest Auto Company I went ahead to withdraw my \$250.00, and I went to see Mr. Harmon and Mrs. Harmon and Thornton.

By Mr. IVEY.—(Q.) Will you speak just a little louder, Mr. Burke?

A. (Continuing:) I went to see Mr. Harmon to withdraw my \$250.00 that I had up as a deposit on my contract, and I seen Mr. Harmon, Mrs. Harmon and Mr. Thornton, and they were not in a position to give me the refund, but I got the refund by buying a car that they had on the floor, issued my check for it, stopped payment on the check until such time the \$250.00 was made good.

Q. Well, was there any other reason for your going to see Mr. Harmon about that time? A. No.

Q. Well, did you tell Mr. and Mrs. Harmon your

(Testimony of Albert Burke.)

contract was cancelled with them?     A. I did.

Q. What reasons did you assign?

A. For the reason I couldn't get any more service on cars.

Q. Couldn't get any more service out of them?

A. No, sir.

Q. And what kind of service was it that they were not furnishing you?     A. On delivery of cars.

Q. Well, did you assign any other reasons?

A. The reasons were, they were supposed to have cars there at certain dates there for me, which they did not have. [220] I had to go down to the bank and take the bill of lading, take up the bill of lading with my own checks, go down to the freight-house with my own check, pay freight, payment on the bill of lading for trucks that come in, and they were supposed to have these cars and trucks delivered at their place of business; consequently there was—

Mr. HALVERSTADT.—Now, just one minute. In view of the fact there was a written contract between these parties I move to strike so much of the answer as stating that it was supposed to be thus and so.

The COURT.—The supposition will be stricken out and the jury will disregard his answers so far as based upon supposition.

By Mr. IVEY.—(Q.) Well, state what you did actually do with reference to having to go down to the bank and get the bill of lading? Just go ahead with that and just leave out what was supposed to have happened.

(Testimony of Albert Burke.)

A. I went to the bank and took up the bill of *ladings*. Also to the—

Q. Then how did you get your car?

A. Go down to the warehouse and help *unlead* them.

Q. And what reasons did Mr. Harmon assign for putting you to that trouble, if any?

A. Didn't have the financial—did not have the money.

Q. What financial do you refer to?

A. Didn't have the money to take up these cars.

Q. Did you get any cars from him on this contract at all? A. On that contract? Yes.

Q. How many? [221] A. About ten.

Q. Well, did you have any trouble with those that you got? A. I did.

Q. What trouble was it that you had?

A. One car that is supposed to have been a new car was a car that had been used as a demonstrator and refinished.

Q. Well, what representations, if any, were made to you with reference to this being a new car?

Mr. HALVERSTADT.—Now, if the Court please, I don't want to—

The COURT.—Just make your objections.

Mr. HALVERSTADT.—I object on the ground it is incompetent, irrelevant and immaterial.

The COURT.—Sustained.

Mr. IVEY.—Your Honor please,—

The COURT.—You are not trying any issue between him and this other company.



(Testimony of Albert Burke.)

Mr. IVEY.—I pleaded it, your Honor please, that the conduct of this Harmon Motor Car Company was such as to bring the Reo machine in ill repute, and I am now proving that his conduct was not such as would have been expected, reasonably been expected from anybody who conducted his business properly.

The COURT.—Sustained.

Mr. IVEY.—Like an exception.

Q. Were there any other reasons besides those that you have already given why you cancelled your contract with the Harmon Motor Car Company?

A. No.

Mr. IVEY.—That is all at present. [222]

Cross-examination.

(By Mr. HALVERSTADT.)

Q. The reason you cancelled your contract with the Harmon Motor Car Company for the year, for the season of 1915, was because its contract had been cancelled by the Northwest Auto Company, was it?

A. And business relations were not pleasant.

Q. But that was the principal reason?

A. Correct.

Q. And you wanted to get your deposit back?

A. I got my deposit back.

Q. Now, that was the time when you had the conversation with Mr. Harmon, was it?

A. And Mrs. and Mr. Thornton.

Q. If cars had been delivered to you at the times they were to have been delivered according to that contract, could you and would have carried out that contract?

(Testimony of Albert Burke.)

Mr. IVEY.—Object to that as calling for a conclusion, your Honor please. The witness testified to two reasons why he cancelled that contract. One was because he couldn't deliver cars and the other was because their relations were very unpleasant.

The COURT.—He may answer.

Q. (Question repeated.)

A. I would not.

By Mr. HALVERSTADT.—(Q.) Were you financially able to carry out that contract?

A. I was.

Mr. HALVERSTADT.—You were. Yes, sir. That's all. [223]

Redirect Examination.

(By Mr. IVEY.)

Q. What relations were those you referred to as being unpleasant between you and the Harmon Motor Car Company?

A. Delivering a car to me, a second-hand car, as a new car.

Mr. HALVERSTADT.—Object to that. That is objected to as incompetent, irrelevant and immaterial. The rights between these parties are fixed by the contract.

Mr. IVEY.—Opposing counsel brought out the fact there were two reasons—

The COURT.—I have already ruled on this question as to the second-hand car. That is not the issue here.

By Mr. IVEY.—(Q.) I didn't get your answer to that question when Mr. Halverstadt asked you

(Testimony of Albert Burke.)

whether or not, if the Harmon Motor Car Company had been able to furnish you with the cars, as to whether or not you would have kept your contract with them? A. I would not.

Q. You said you would not? A. No, sir.

Q. Why would you not have kept your contract with them?

A. Because the business relations were unpleasant, weren't pleasant.

Mr. HALVERSTADT.—I move to strike the answer because the contract does not provide for cancellation on such a contingency.

The COURT.—The answer is stricken.

By Mr. IVEY.—(Q.) Well, what were the facts that caused you to cancel this contract in addition to not having furnished you the cars? [224]

Mr. HALVERSTADT.—We object because it is incompetent, irrelevant and immaterial. Their rights are fixed by the contract. Until counsel can point out a breach of that contract—

Mr. IVEY.—The witness says he wouldn't have—

The COURT.—Sustained. The witness can't determine the law.

Mr. IVEY.—Well, if your Honor please, the witness might right at this time state a good and sufficient reason, and I will state that in my opinion it would be an absolute defense.

The COURT.—Well, let him state it, then, aside from what I have already ruled on.

By Mr. IVEY.—(Q.) Were there any other rea-

(Testimony of Albert Burke.)

sons, then, besides this incident about that automobile?

Mr. HALVERSTADT.—Same objection, your Honor.

The COURT.—Let him state it.

A. Why, his way of doing business, the time he was arrested and going in jail.

Q. Now, if I may go on to state any further instance,—

Mr. HALVERSTADT.—We object to a general discourse to the answer.

The COURT.—Yes, I must sustain the objection, because we are not trying out the issues between the Harmon Motor Car Company and this witness; that's a new issue entirely; that is not before the Court.

Mr. IVEY.—Like an exception, your Honor.

The COURT.—Noted.

Mr. IVEY.—That is all. [225]

Recross-examination.

(By Mr. HALVERSTADT.)

Q. Mr. Burke, how many Reo automobiles did you sell between the cancellation of this contract of the Harmon Motor Car Company and July 31, 1915?

A. I haven't got the number, but I would judge about ten cars.

Q. About how many?      A. About ten.

Q. What was the reason you didn't sell more than ten?

A. That's all there were to be sold.

Q. You sold your full allotment?

(Testimony of Albert Burke.)

A. Yes. You can only sell so many.

Q. In other words, did you sell the full allotment that you contracted for?

A. I don't remember the contract.

Q. Twenty?      A. Twenty, yes.

Mr. HALVERSTADT.—That is all.

(By Mr. IVEY.)

Q. How many of those did you get from the Harmon Motor Car Company?

A. I got about ten, I should think.

Q. And then you got ten from the other?

A. Sharpe & Leader, the Puget Sound Motor Company.

Mr. IVEY.—That is all.

(By Mr. HALVERSTADT.)

Q. Isn't it a fact you only got five?

A. I was called on this case on a few minutes' notice, and [226] I haven't the records with me nor the account with me.

Q. All I want to know, Mr. Burke, was whether your recollection was so clear that you would state definitely that it wasn't just five that you got from the Harmon Motor Car Company?

A. No, I wouldn't state.

Mr. HALVERSTADT.—That's all.

Mr. IVEY.—That is all.

(Witness excused.) [227]

**Testimony of W. J. H. Clark, for Defendant.**

W. J. H. CLARK, produced as a witness on behalf of the defendant, being first duly sworn, testified as follows:

## Direct Examination.

(By Mr. IVEY.)

Q. Mr. Clark, what is your full name?

A. W. J. H. Clark.

Q. Where is your residence, Mr. Clark?

A. Portland.

Q. What business are you engaged in?

A. Secretary of the Northwest Auto Company.

Q. That is the defendant in this case?

A. Yes, sir.

Q. Were you engaged with this company at the time this contract involved in this suit was made?

A. Yes, sir.

Q. I will ask you, Mr. Clark, if you had any telephone conversations with Mr. Thornton, of the Harmon Motor Car Company, along in the fall of 1914 relative to the delivery of the cars under this contract?

A. I believe that Mr. Thornton did call up over the long distance 'phone once or twice. Might have been more, but once or twice I think he did call up.

Q. Well, what was the conversation you had with him on those times, if you recall?

A. Well, he would ask whether we got any cars—that is in the fall of 1914—whether we had got any

(Testimony of W. J. H. Clark.)

cars down there, and I would answer him, "No, we had not."

Q. You said you were Secretary?

A. Secretary, yes, sir. [228]

Q. Well, do you attend to the correspondence between your company and its subagents generally?

A. Yes, a good deal of it.

Q. Do you know whether or not at any time Mr. Thornton ever gave you any specifications as to any particular cars that they would require under that contract? A. I have no recollection of any.

Q. What were his demands, what did they consist in when he did ring you up?

A. Of course, it was a general conversation, and he would state that they could sell cars, that they wanted cars, and all I could reply was that we hadn't got any and we couldn't tell—

Mr. HALVERSTADT.—I move to strike the latter part of the answer to the effect of the witness saying he hasn't got any, because under the provision in the contract the condition which excuses non-performance must be affirmatively pleased, and it is not done.

Mr. IVEY.—I ask to amend the pleadings to that extent, your Honor please.

Mr. HALVERSTADT.—We object to that because it will put an issue in here that will force a continuance.

Mr. IVEY.—They can't plead surprise, because Thornton said he was informed at that time the reason why they didn't furnish more cars was because

(Testimony of W. J. H. Clark.)

they did not have them. They knew that all along; they can't be surprised at it at all. Thornton admitted that, and they all say they knew all the time everybody was having a lot of trouble.

The COURT.—As I said a moment ago, this isn't an action to recover damages for nondelivery, this is an action to [229] recover for damages claimed to have been sustained by reason of a wrongful revocation of the contract, and I don't think that this is material one way or the other.

Mr. IVEY.—I noticed that was your Honor's construction of this suit a while ago on the ruling. As I said at the time, I don't know whether the plaintiff is seeking to recover both upon the theory that we did not deliver the necessary number of cars up to the time the contract was cancelled and also for the profits they would have made on those cars that hadn't been delivered at the time the contract was cancelled. There seemed to be two theories.

The COURT.—If it is contended here on the part of the plaintiff that the manufacturing concern were unable to furnish cars as provided by this contract during the time of this contract that would be material, but up to the point of cancellation, why, that would not add anything to the testimony upon which the jury ought to conclude, and what obtained after that up to this point, it is not material.

Mr. IVEY.—Well, if it is understood, your Honor please, between the Court and counsel and myself that they are not undertaking to recover for our not having furnished the full quota of cars down to the



(Testimony of W. J. H. Clark.)

time the contract was cancelled, then I can see there is no materiality in this answer *I eliciting*, except this: It is contended by plaintiff that they were entitled to forty-three more cars than those that were contracted for. They say they sold nine and contracted for a certain number more, and they were entitled to still a certain number more. Now, I think I can show your Honor that this evidence that I am [230] asking the witness about now would go to show that they were not entitled to forty-three more besides those they contracted for, because the number we were to furnish them depended on our ability to get them from the factory. Now, if we weren't able to get those cars from the factory, why, I don't see how they would have been entitled to forty-three, nor how they have been entitled to damages, nor to any profits they would have made on forty-three, because the only profits they would have made would have been on those cars we could have furnished them under our contract. That brings us right back to that factory proposition. They have the same clause in their contract with their subagents. Your Honor is ruling that out against me?

The COURT.—Yes. I will allow an exception.

By Mr. IVEY.—(Q.) Mr. Clark, do you know whether or not that note that is referred to in this contract between the Harmon Motor Car Company and the defendant company was ever paid?

A. It was not paid in full.

Q. Has it ever been finally settled up?

A. There was some payments made on it, and then

(Testimony of W. J. H. Clark.)

if the deposit which was put up by the plaintiff was taken into account, of course, the note would then be satisfied, but not taking the deposit placed by the plaintiff into account the note would not be satisfied.

Q. Well, what deposit, now, do you refer to?

A. They said—I have heard that they placed \$750.00 on deposit. That is not so, according to our records.

Q. How much money did you have, how much money did you get [231] down there?

A. They first of all placed a sum of five hundred dollars. Then they placed a further sum of two hundred dollars, making seven hundred dollars. And then very nearly a year later they placed another sum of five hundred dollars, making a total sum of twelve hundred.

Q. That twelve hundred was placed with you, then, in connection with some other contracts than this one that is being sued on, you say a year later?

A. Yes. It wasn't always understood to be on the Reo contract, so far as I know. Those are the same as all money that were placed on deposit.

Q. Now, did you say you had to use that \$750.00 to pay the balance on this note?

A. There never was a sum of \$750.00 paid.

Q. Well, what about that twelve hundred dollars you spoke about?

A. The twelve hundred dollars—to pay the note a portion of that twelve hundred dollars would have to be taken into account, which was the deposit on the contract.

(Testimony of W. J. H. Clark.)

Q. Well, when was the note finally settled up by you making the application of this \$750.00 on the note?

A. The note really has never been absolutely settled up, the way I understand it, unless the money which is on—

Mr. HALVERSTADT.—We move to strike that out because he says “I understand it.”

A. I would judge that and say according to our books.

Mr. HALVERSTADT.—We ask to have the books produced.

By Mr. IVEY.—(Q.) Have you the books?

A. I have the ledger sheets there. [232]

Q. Do you make your entries in that originally? Let's see your ledger sheets.

A. They are right in that case, Mr. Ivey (indicating).

Q. In this case (indicating)? A. Yes.

Q. (Handing papers to witness.)

A. That is it.

Mr. HALVERSTADT.—I would like to ask Mr. Clark a question: In whose handwriting are these figures on this sheet Mr. Ivey holds?

A. They are in the handwriting of the bookkeeper who was in our employ at that time.

Q. Are these the original entries?

A. Those are the original entries.

Mr. IVEY.—Your Honor please, I didn't want to bring that bookkeeper up here.

The WITNESS.—The bookkeeper is no longer in

(Testimony of W. J. H. Clark.)

our employ, but those entries were made under my authority, under my orders. She was under my orders all the time.

By Mr. IVEY.—(Q.) You ever check up these entries to see whether they are correct or not?

A. Those entries have been all checked, not only by me but by a firm of accountants.

Q. And you know this represents the payments that were made on this note?

A. On the deposit account.

Q. On the deposit account? A. Yes.

Q. What is this other sheet (indicating)?

A. That sheet doesn't belong to it. I guess it was pulled [233] out.

Q. Did you have any other accounts with the Harmon Motor Car Company except that one?

A. Oh, yes, we have a Car Account and a Parts Account.

Q. But this is the Note Account?

A. This is the Deposit Account.

Q. Well, how about those other accounts that you speak of, were they all settled up?

A. No, sir, they were not. The Parts Account was not settled.

Q. The Parts Account was not? A. No.

Q. Do you know how much the balance due on the Parts Account was?

A. Somewhere around the neighborhood of \$530.00.

Q. Now, if I understand you correctly, the \$750.00 which was being held as a deposit under this con-

(Testimony of W. J. H. Clark.)

tract was used to pay the balance due on this note?

A. Yes, whatever money was used to pay the balance of the note.

Q. When was that application made?

A. That application was made somewhere around about the end of February.

Q. After the—

A. After the cancellation of the contract.

Q. After the cancellation of the contract?

A. Yes, sir.

Q. Do you recall ever having notified the Harmon Motor Car Company of that application?

A. Recall notifying—Oh, yes, I wrote them many times in regard to it. [234]

Q. Have you that bunch of letters that we had?

A. I think you have them.

The COURT.—Take a recess for a few minutes.

(RECESS.)

By Mr. IVEY.—(Q.) Leaving that subject of that note for the present, and calling your attention—the Court is now of the opinion that I may ask you as to why you didn't furnish more cars than you did to the Harmon Motor Car Company up to the time that the contract was cancelled. I will ask you as to what the reasons were you didn't furnish more cars to the Harmon Motor Car Company than you did up to the time the contract was cancelled?

Mr. HALVERSTADT.—We object to that on the ground that there is no pleading which will permit the introduction of such proof. It is a matter which must be affirmative plead.

(Testimony of W. J. H. Clark.)

Mr. IVEY.—An oversight of mine. I now ask the Court to permit me to amend my answer so as to show that the reason why—

Mr. HALVERSTADT.—May I suggest this: Will you dictate to the reporter the additional affirmative defense you want put in?

Mr. IVEY.—Yes, I will do that. That the defendant did not furnish to the Harmon Motor Car Company up to the time the contract was cancelled the full number of cars provided for in said contract to be furnished prior to that time, up to that time; that the defendant furnished all of the cars to the Harmon Motor Car Company during that period of time that it could procure from the manufacturer of the Reo machines that were not allotted under the contract, [235] under the conditions thereof, to other agencies; and that if the Harmon Motor Car Company suffered damage by reason of not getting the entire number of cars that is called for or that is mentioned in said contract it was through no fault of this defendant company, but was due to the fact that the defendant company could not procure these cars from the manufacturer, that is, a sufficient number thereof to furnish Harmon Motor Car Company with said number.

Now, that is the first amendment that I ask your Honor to permit us to make, and when that has been ruled upon I shall ask for a further amendment.

Mr. HALVERSTADT.—We object to the amendment at this time in the midst of the trial.

(Testimony of W. J. H. Clark.)

The COURT.—I think the amendment should be allowed.

Mr. HALVERSTADT.—Exception. The record may show the affirmative matter is denied by a reply?

The COURT.—Yes.

Mr. IVEY.—Oh, yes, by stipulation. Now, I ask the Court at this time to permit me to allege affirmatively as follows:

That if the contract in question had not been rescinded or cancelled by the defendant company that the defendant company would not have been able to furnish the Harmon Motor Car Company the entire number of cars specified in the contract between the dates of the cancellation of the contract and the termination thereof, for the reason that it, the defendant, could not have procured a sufficient number from the manufacturer to so furnish these, and to furnish the other orders that are referred to in the contract. [236]

I call your Honor's attention to the fact that in that contract it says "provided these cars are not ordered, or covered by orders, and providing we can get them from the factory," which is a condition that they seem to incorporate in all these contracts. I ask the Court to let me make that amendment.

Mr. HALVERSTADT.—Make the same objection. And it is likewise a repetition.

The COURT.—What is the objection, Mr. Halverstadt?

Mr. HALVERSTADT.—It is a mere repetition of the former, is it not?

(Testimony of W. J. H. Clark.)

The COURT.—The former limits it to the February time, to the cancellation of the contract, and this takes it from that time on?

Mr. IVEY.—Yes, sir. I anticipated your Honor's ruling might be different on the two periods of time.

The COURT.—Well, I look at it differently. I want to know what the objection is.

Mr. HALVERSTADT.—There are two objections. The first one is that it stands admitted this contract was cancelled and that we thereby were prevented from getting cars. Now, it doesn't lie in the mouth of this defendant to say, "It is true I cancelled your contract and put you out of commission, but if I hadn't I couldn't have given you the cars." There is an inconsistent position taken there. It can take one of two things, one position or the other, but it can't take both at the same time.

The COURT.—What is the next ground of the objection?

Mr. HALVERSTADT.—The ground that occurred to me I don't think is good. I didn't notice the two referred to different [237] periods of time, I thought it was a mere repetition, but that ground alone, it seems to me, is ample. I don't think it incorporates the language in the contract either.

The COURT.—I think that the same rights of the parties that are set forth in the contract would be carried forward and the benefits would inure to both or either party, and the cancellation of the contract would not foreclose the party against any right that he has under the contract nor give him any benefit



(Testimony of W. J. H. Clark.)

which the contract might provide, so that I don't think that the objection is well taken. That is, if the defendant could have defended against a charge of nonsupply of these machines upon the ground that they didn't get them from the factory, then they certainly should be permitted to avail themselves of the same right in an action for nondelivery by reason of the cancellation of the contract, and so if that is the only objection the second amendment may likewise be made.

Mr. HALVERSTADT.—Exception.

The COURT.—Yes. You may proceed.

By Mr. IVEY.—(Q.) Mr. Clark, do you remember how many cars you furnished under this contract up to the time it was cancelled; you remember offhand?

A. Up to the time of cancellation?

Q. Yes.

A. We furnished to the Harmon Motor Car Company, I believe, ten cars all together.

Q. That was up to the time the contract was cancelled. Do you remember when the last shipment went in? You can refer to exhibits to find out.

A. The last shipment of cars went in in February.  
[238]

Q. Was that the shipment that was referred to in one of these exhibits yesterday? It was in a letter, I think, which was dated February 15th.

A. I believe that was the date.

Q. That was the shipment referred to in this letter (exhibiting paper to witness)?

A. Yes, that is the shipment referred to. It was

(Testimony of W. J. H. Clark.)

delivered to them in February.

Q. Who wrote that letter, you?

A. I wrote that letter; yes, sir.

Q. Well, did you know at the time you wrote that letter that that contract was going to be cancelled?

A. No, I did not, not at this time, not on February 15th.

Q. How many were in that shipment?

A. Four cars in that shipment.

Q. Is that a part of the ten that you said the Harmon Motor Car Company got?

A. That is a part of the ten.

Q. You mention a Six in there. Did you ever get that Six for them?     A. No, sir.

Q. Where were those cars being sent from?

A. Sent from Lansing, Michigan.

Q. From the factory?

A. From the factory at Lansing, Michigan.

Q. Well, did all the cars that you furnished the Harmon Motor Car Company come direct from Lansing, Michigan, or some of them come up from Portland?

A. I think one come from Portland—or two come from Portland out of the ten, and eight were shipped directly from the [239] factory.

Q. Now, just briefly, Mr. Clark, state why you didn't furnish more cars than you did? You furnished ten, you said, and Mr. Thornton said that he rang you up a number of times and asked you to furnish those cars. Why didn't you furnish them?

(Testimony of W. J. H. Clark.)

A. We could not furnish them; we didn't have them to furnish—

Q. Tried to get them?

A. —owing to the factory not being able to deliver.

Q. You did your best to get them, did you?

A. We did the best we could. We spent—I suppose our telegraph bill amounted to something like seventy or eighty dollars a month. We telegraphed the factory every night.

Mr. HALVERSTADT.—That is immaterial, your Honor, and I move to strike that matter in regard to the telegrams.

The COURT.—That answer will be stricken and the jurors will disregard it.

By Mr. IVEY.—(Q.) Now, Mr. Clark, did you have any difficulty in getting the number of cars that you expected to furnish these out of from the time this contract was cancelled until July 31, 1915? Just answer yes or no.

A. Yes, we did have considerable difficulty.

Q. Well, if this contract had not been cancelled how many more cars besides these ten would you have been able to furnish to the Harmon Motor Car Company, if any?

Mr. HALVERSTADT.—Now, we object on the ground that having cancelled this contract they are not now in a position to say, “It is true we cancelled the contract, but we couldn't have fulfilled it anyhow.” It is incompetent, irrelevant and immaterial,

(Testimony of W. J. H. Clark.)

and that the amended matter [240] in the answer does not constitute a defense.

The COURT.—Oh, he may state whether the factory was unable to furnish these cars by reason of preceding orders for cars.

Mr. HALVERSTADT.—Let me make this suggestion, your Honor: That answer would be subject to secondary evidence only, would it not, unless the question was that he knows of his own knowledge?

The COURT.—Oh, it must be competent testimony, according to the provisions of the contract, whether the factory was unable to furnish the cars in the order in which they were—

Mr. HALVERSTADT.—May I cross-examine on that one point how to determine whether he does know that of his own knowledge?

The COURT.—You may ask him whether he knows.

(By Mr. HALVERSTADT.)

Q. Do you know of your own knowledge the condition that existed in the factory, aside from what somebody told you, or what you read in a letter, or otherwise?

A. Not from personal knowledge of the factory, no.

Q. Whatever knowledge you got you got how?

A. From written and telegraphic information from the factory.

Mr. HALVERSTADT.—We object, then, on the ground it is not the best evidence.

By Mr. IVEY.—(Q.) What became of your tele-

(Testimony of W. J. H. Clark.)

graphic correspondence to the factory about it?

A. Our correspondence with the factory up to July, 1915, has been destroyed.

Q. Why was that destroyed?

A. We keep—owing to the bulk of correspondence we have down there we have an enormous amount of correspondence with the [241] factory. We do not keep more than two years' correspondence in our files.

Q. Who destroyed this particular correspondence, do you know?

A. Our head stenographer, Miss La Febvere.

Q. Where does she live?

A. She lives in Seattle at the present time.

Q. Do you know who she is working for?

A. She is working for the George S. Bush custom house brokers, George S. Bush Company.

Q. In the Colman building?

A. Yes, sir, in the Colman building.

Q. And you know of your own knowledge that correspondence was all destroyed? A. I do, sir.

Q. Now, I ask you this, if you know how many cars you would have been able to furnish out of the cars that you were able to get from the factory to the Harmon Motor Car Company under this contract if the contract had not been canceled? Just answer yes or no, if you know how many you would have been able to furnish? A. Yes.

Q. How many would you have been able to furnish?

Mr. HALVERSTADT.—We object to that on the

(Testimony of W. J. H. Clark.)

ground it is incompetent, irrelevant and immaterial, and according to his own statement his knowledge is pure hearsay, that which he got from correspondence. Now, your Honor, I take it the rule of law is this, that a rule which would permit a factory back there to say, "Oh, we can't furnish you cars," write a letter to that effect, that letter be entered in evidence as conclusive proof against us, and [242] we not be permitted to cross-examine on the ultimate fact whether the factory was able to furnish cars, is not a rule of law. Now, this witness has clearly shown that his knowledge is pure hearsay. Even if these letters and these telegrams were not destroyed and were offered in evidence they would be subject to the same objection as not the best evidence.

The COURT.—Let me see the contract.

Mr. IVEY.—I have a copy of it, your Honor (handing same to the Court).

Mr. HALVERSTADT.—Furthermore, referring to previous contracts, we would have the right to inquire of the company as to every contract which was in existence at that time, and to prove the exception they would have to submit the best evidence of those things.

The COURT.—I think the question may be answered.

Mr. HALVERSTADT.—Exception.

Mr. IVEY.—Answer the question.

A. I would think we would have been able to supply them with fifty cars, forty-five to fifty cars.

(Testimony of W. J. H. Clark.)

Q. Altogether?

A. From the unexpired—from the date of the cancellation to the date of the termination; that is, in addition to the ones that we supplied.

Q. In other words, then, you could have furnished them about sixty-five cars altogether?

A. About sixty-five cars.

Q. Mr. Clark, how long have you been in the automobile business?     A. Since 1908; nine years.

[243]

Q. At the time this contract was canceled were you an officer of the company?

A. Yes, sir, secretary of the company.

Q. How many trustees in your company?

A. Three directors.

Q. Directors you call them?     A. Yes.

Q. Who were they?

A. Mr. F. W. Vogler, president, Mr. Frank D. Vogler, vice-president, and myself, secretary.

Q. Did you three directors, at the time this contract was canceled, know anything about it or not?

A. Oh, yes.

Q. Know anything about the fact that the contract was about to be canceled by Mr. Vogler? In other words, did you know he was about to write this letter?

Mr. HALVERSTADT.—That would be immaterial if the company has adopted the act of some unauthorized party, and that is conclusively shown by the fact we have been here two days.

(Testimony of W. J. H. Clark.)

Mr. IVEY.—You will agree this was done by authority—

Mr. HALVERSTADT.—So far as this is concerned this is a company act.

Mr. IVEY.—Done by authority of the directors, too, I suppose?

Mr. HALVERSTADT.—They can't now claim it was the act of an unauthorized agent and put us out of court.

Mr. IVEY.—You don't know what the witness is going to say.

Mr. HALVERSTADT.—I can only assume—

The COURT.—Let him answer.

By Mr. IVEY.—(Q.) Was it done by authority of all three of [244] you directors?

A. Yes, sir.

Mr. HALVERSTADT.—We object to that. That is immaterial.

The COURT.—It is answered. Proceed.

Mr. IVEY.—I think that is all, Mr. Halverstadt, at this time.

Cross-examination.

(By Mr. HALVERSTADT.)

Q. Mr. Clark, it is a fact, is it not, that very shortly after this contract in suit was signed the Harmon Motor Car Company were asking for cars, is it not?

A. Oh, I would say within thirty days, yes.

Q. Very shortly after? A. Yes.

Q. And they were always wanting to get cars during the entire time of the contract, were they not?

A. I wouldn't say always.



(Testimony of W. J. H. Clark.)

Q. But they did call you up several times, you say, asking for cars?

A. I recollect Mr. Thornton calling up on two occasions.

Q. And didn't he tell you on those occasions to send him any kind of cars you had, irrespective of the size, or model, or color, or anything else, just so they were 1915 Reos?

A. I have no recollection of that.

Q. But you did know, did you not, they wanted all the cars you could give them?

A. Oh, I presumed that they did, yes.

Q. You knew that they wanted all the cars you could give them, did you not?

A. No, I did not know. [245]

Q. And no one on behalf of the Northwest Auto Company did know that fact?

A. I am not able to answer that question. I can only speak for myself.

Q. Now, you knew the subcontracts they had, did you not? A. Oh, yes.

Q. You knew the number of cars they had agreed to furnish, didn't you? A. Yes.

Q. And you are not complaining now, are you, that they weren't taking cars if you could give them to them? A. No.

Q. You have no complaint on the number of cars sold at all, have you? A. No.

Q. They sold all the cars, and more, you say, than you could furnish?

A. Well, yes, possibly they did.

(Testimony of W. J. H. Clark.)

Q. Did you ever communicate with the Harmon Motor Car Company in any way, or, furthermore, suggesting, you could furnish them cars they didn't take? A. No, sir.

Q. Now, Mr. Clark, so far as concerns the existence of any condition at the factory at Lansing, Michigan, whatever you know about it came from correspondence, letters, telegrams, and so on?

A. Exactly.

Q. You are not speaking of anything that you may have learned if you ever were there during this period? A. No, sir. [246]

Q. You are not, you say?

A. I am not speaking.

Mr. HALVERSTADT.—Now, I move to strike out the testimony of the witness as to the condition existing there because it is clearly hearsay; it's a self-serving declaration by the testimony. If admissible testimony could be offered against us we would have the right to cross-examine the original source from which that testimony came. Now, if we are to be put in the position that this does put us in, then it would follow that if the factory wants to make a statement that for all practical purposes is gospel truth we have absolutely no chance whatever to question it, to question them, to find out whether the statements in their letters or telegrams are correct or whether they are not, and for that reason we move to strike the testimony concerning the same. Now, they are pleading an exception here which, under the ruling of the Court, if it has been proven

(Testimony of W. J. H. Clark.)

in that manner, we then are in a situation where, without an issue in that case in ten months, we have got to meet the one thing which is either going to let the defendant out or wreck the plaintiff. Now, it is for that reason, and particularly because the situation is that, that I submit that we ought to have the right to examine the original source of information, and not simply be confronted not only with a letter written by somebody who knew the conditions, but without the slightest criticism of the witness, be confronted not only with that, but with the frailty of human recollection. Now, it seems to me, your Honor, that the testimony should be stricken. [247]

The COURT.—What do you think about it, Mr. Ivey?

(Argument.)

The COURT.—This is the contingency, that is, it is “due to strikes, floods, accidents, or any other cause beyond the control of the manufacturer or seller, whether occurring in the plant of the manufacturer, or in that of any concern from which the manufacturer or seller purchases parts or equipments.” And I hardly think that the Court could accept a letter of the concern, some one connected with the concern, and deprive the other side of the opportunity of cross-examination upon the facts upon which the conclusions in the letter are based. I think that the Court must strike that testimony.

Mr. IVEY.—Like an exception, if your Honor please.

The COURT.—Yes. And the testimony of the

(Testimony of W. J. H. Clark.)

witness, gentlemen of the jury, that they were unable to get cars from the manufacturer is stricken and withdrawn from your consideration.

Direct Examination (Resumed).

(By Mr. IVEY.)

Q. Calling your attention, Mr. Clark, to that clause in the contract to the effect that the number of cars you were to furnish the Harmon Motor Car Company, which reads as follows: "Subject to the prior orders of other dealers," how many cars, how many orders from other dealers besides the Harmon Motor Car Company did you have with reference to the number of cars that you were able to get from the factory?

Mr. HALVERSTADT.—We object to that on this ground, that there [248] is an ambiguity in the contract in that particular, "Subject to the prior orders of other dealers." From whom? "And as the business of the manufacturer will permit." That is subject to the prior orders of other dealers from the manufacturer and as the business of the manufacturer will permit. Now, bear in mind the rule which the Supreme Court of the United States has adopted, to the effect that if one of two parties has prepared a contract and there is any construction of that contract required it will be construed most strongly against the party who prepared it. The obvious answer to counsel's question, to counsel's position is that if it was the purpose to cover the Northwest Auto Company in that clause the Northwest Auto Company would have been mentioned,

(Testimony of W. J. H. Clark.)

and we object to the testimony for that reason, invoking the rule of a strong construction of that contract against the defendant. Further than that, the contracts themselves are the best evidence, the orders.

The COURT.—I don't think there is an ambiguity here. It says it shall be "subject to the prior orders of other dealers and as the business of the manufacturer—" going back to the first clause of this paragraph. I think the question may be answered.

Mr. HALVERSTADT.—Exception. I make this further objection, that is, that it is pure hearsay. Let them produce the orders.

The COURT.—Well, I am presuming it would be competent testimony.

Mr. HALVERSTADT.—All right.

Mr. IVEY.—Read the question, please. [249]

Q. (Question repeated.) What I mean is about what per cent?

Mr. HALVERSTADT.—Now, that is just beating the devil around the bush, your Honor. That is proving what is in writing indirectly, which is pure hearsay, and this is not the best evidence.

Mr. IVEY.—The only thing I want to show is that we did the best we could. I am willing to show exactly how many cars were furnished that other company.

Mr. HALVERSTADT.—All right. Now, you can show that by producing the orders. Under the Court's ruling we have nothing to say if those orders are produced.

(Testimony of W. J. H. Clark.)

By Mr. IVEY.—(Q.) Have you those books here, Mr. Clark?

A. Well, those would be the contracts. Now, I believe that we still have them in Portland. We would have to get them from Portland.

Q. Do those books you have up here show how many cars you sent to Sharpe & Leader?

A. Oh, yes.

Q. That's what I am talking about. A. Yes.

Q. Did you have the same kind of contract with Sharpe & Leader that you had with the Harmon Motor Car Company?

A. To my best knowledge and belief we did.

Q. Or whatever the name of them was.

A. The Puget Sound Motor Car Company.

Q. They succeeded the Harmon Motor Car Company? A. Yes, sir, they did.

Q. And have you your books here to show how many cars you furnished them?

A. No, those books are in Portland. [250]

Q. I mean how many cars you furnished the Puget Sound Motor Car Company? You haven't those books with you?

A. I haven't the books, no. Those are still in Portland. I know how many we furnished them.

Q. How many?

Mr. HALVERSTADT.—We object to that.

Mr. IVEY.—I withdraw that. When you come back bring that book with you, will you?

The WITNESS.—Yes.

Mr. IVEY.—I think I have no further questions

(Testimony of P. E. Sands.)  
at this time, Mr. Halverstadt.

Mr. HALVERSTADT.—There will be no cross-examination at this time if he is to go back on the stand again on these other matters.

(Witness excused.) [251]

**Testimony of P. E. Sands, for Defendant.**

P. E. SANDS, produced as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. IVEY.)

Q. Mr. Sands, you live in Seattle?

A. Yes, sir.

Q. How long have you lived here, Mr. Sands?

A. Nine years.

Q. What business are you now engaged in?

A. Automobile business.

Q. How long have you been so engaged in the automobile business?     A. Nine years.

Q. What car do you handle?     A. Studebaker.

Q. Where is your place of business; I mean what part of the city of Seattle?

A. Broadway, near Pike.

Q. Did you ever know anything about the Harmon Motor Car Company at the time they were handling the Reo cars?     A. Not very much.

Q. Mr. Sands, do you know about what per cent of the volume of business that is handled by the average motor car concern, such as the one you are handling, is made annually as profits? Just answer yes or no first.     A. Yes.

(Testimony of P. E. Sands.)

Q. What would you say is about the best profit that is made annually on the volume of business handled by a concern run reasonably well? [252]

Mr. HALVERSTADT.—Now, we object to that on the ground it is incompetent, irrelevant and immaterial. If I, for instance, happen to have a plant which is run economically, well, carefully and otherwise, the damages which are coming to me for the breach of a contract by Mr. Ivey are not to be measured by the carelessness of someone else. Let him bring the conditions existing in this plaint into the question and then we will have something different.

Mr. IVEY.—I asked the witness if he knew anything about this Harmon Motor Car Company.

Mr. HALVERSTADT.—And he said he didn't.

Mr. IVEY.—I want to get this witness to put the upper limit on the profits. Mr. Harmon himself this morning made the preposterous statement that he had never in his life figured out what his profits were, and could not do so at this time. I am going to show this Court and this jury that there isn't a single motor car company in this city that has ever at any time made more than three per cent on their volume of business. I am going to show your Honor by Mr. Sands' testimony, and show the jury by his testimony, that more than half of them go busted—I mean fail completely. Pardon my street language. If a company is run very, very successfully and most economically I will let Mr. Sands give the upper limit and counsel can cross-examine him as long as he likes. Mr. Sands is eminently qualified; he has



(Testimony of P. E. Sands.)

been running this business for a long while. There was some suggestion made a day or two ago by parties to this suit they made fifteen per cent. Your Honor, I have got to meet that; there is the whole point. If they kept their books, if the Harmon Company [253] had kept its books, that's where you would go to find out about how much they would make, but they didn't keep any books. They have a lot of things here nobody can make out. That is what I wanted with that information, how much they were worth at the beginning of 1914 and 1915. I was going to subtract that, one of those from the other, and then it would be possible to tell you gentlemen just about what they were making. I think that question is proper.

The COURT.—I think the objection must be sustained for this reason: Mr. Sands' business, or some other business, is not a matter which is a proper subject of expert testimony. It would be in the line of expert testimony. The profits of a concern are subject to calculation. The plaintiff in this case testified with relation to the profits, the cost of the car, the sale price, and items of expense that went into the consummation of sale. Now, the witness might, I think, properly testify as to various items of expenditures that enter into sales and necessary for the consummation of sales of cars; and further, to determine whether the items that were incorporated by the other side are all of the items of expense, or whether the expenditures given are those that are usually paid. But to ask him what per cent his

(Testimony of P. E. Sands.)

business brings him, what per cent of profit, as a criterion by which the jury shall measure the recovery of the plaintiff, I don't think would be permissible.

Mr. IVEY.—I think your Honor misunderstood me on this question. I was careful not to ask him about his business. I asked him about the business generally handled in Seattle, [254] asked him if he knew of the profits of business of that kind in Seattle.

The COURT.—Well, I think that even would be more objectionable. I don't think that would be permissible. Because that is not a subject of expert testimony, it is not a matter of common knowledge.

Mr. IVEY.—It is a little hard to get at, your Honor please.

The COURT.—Yes, I appreciate that.

Mr. IVEY.—From the condition of the plaintiff's books.

The COURT.—Yes.

Mr. IVEY.—Otherwise I could have gotten it right there.

Q. Mr. Sands, I call your attention to some items of expense that Mr. Harmon stated were the expenses of running his business. Would the fact that he had a garage here in Seattle—where is his garage?

Mr. HALVERSTADT.—Pike and Boylston, northwest corner.

By Mr. IVEY.—(Q.) Pike and Boylston, northwest corner, and that he had a contract, which I will

(Testimony of P. E. Sands.)

show you, which is calling for one hundred and ten Reos for the season running from October, 1914, to July, 1915, and to the fact that he testified that in handling those machines his items of expense were the following: He stated the items of expenses of running that garage are as follows: He paid \$225.00 for rent; salaries, one man was \$150.00, another man was \$80.00, and still a third man was \$60.00, and for a mechanic it was \$60.00, and still a *fifty* man, \$65.00; and that his telephone bills, \$9.50, that is the regular telephone; and that the toilet articles were \$1.00; long distance 'phone about \$20.00; advertising, \$50.00, and demonstration, \$30.00 a month. Those items I gave you [255] were the items of the gross cost of running this business, such as the one that I have mentioned to you, and I will ask you if, in your opinion, a business of that kind could be run on items of that kind, and if not, what other items there would have to be and what would be the change in the cost?

Mr. HALVERSTADT.—We object to that on the ground that it is incompetent, irrelevant, immaterial and entirely too general, no qualification shown by the witness..

Mr. IVEY.—The witness says he has been in this automobile business for ten years.

The COURT.—He can go into the items of expense.

A. Can I see that list?

Mr. IVEY.—I don't know if you can read my writing (handing paper to witness).

(Testimony of P. E. Sands.)

A. Is this the list right here, Mr. Ivey (indicating)?

Q. Yes. There is some on this page (indicating), a long distance 'phone bill, \$20.00, an advertising bill, \$50.00, and demonstration bill, \$30.00. Those are the ones that are left out of there.

A. I would say, in answering that, that with a contract of—how many cars, you say?

Q. Forty-three, I think,—no, at that time he had a contract for one hundred and one cars.

A. How many?

Q. He was undertaking to handle a hundred and one of the Reos, besides a few other cars, which I don't think make any particular difference here.

Mr. HALVERSTADT.—Aren't you mistaken? The testimony was, the items of expense Mr. Harmon testified to is the [256] expense which would be necessary for the sale of the remaining forty-three cars.

Mr. IVEY.—I understand he did sell those and wouldn't have any expense at all.

Mr. HALVERSTADT.—Our contention is the expense we had incurred in selling the other cars was paid for. That is the profit we are entitled to if we had the cars.

Mr. IVEY.—It is your contention, then, and your witness testified, that these would be the items of expense incurred per month in handling these forty-three cars which you didn't get.

Mr. HALVERSTADT.—Correct.

By Mr. IVEY.—(Q.) All right, assume you have

(Testimony of P. E. Sands.)

forty-three cars to handle—or I will change that question in this way, Mr. Sands, to make it simpler, I think, for everybody: How much expense do you think that a garage—or what items of expense would a garage have to go to in selling forty-three cars such as the Reo? You are familiar with the Reo cars, of course. Could you give me the items of expense that would be incurred in selling it?

Mr. HALVERSTADT.—Now, your Honor, we object to that on the ground it is incompetent, irrelevant, immaterial, entirely general, takes into consideration not at all the conditions that existed there. What probative value would it have for one man selling forty-three cars to say it would cost so much money irrespective of conditions? One firm may have a very expensive sales organization, they may be all hired help, they may be all drawing salaries. As in this case, that isn't always true. They may be able to get a good rent. [257]

The COURT.—He may answer if there is any item or items.

Mr. HALVERSTADT.—Exception.

By Mr. IVEY.—(Q.) State the average garage, Mr. Sands, and tell me what items of expense, in your opinion, would be incurred in the handling of forty-three cars such as the Reo?

A. Well, if they were simply going to sell forty-three cars and go out of business, and not be prepared, or had no hang-over expense from having run a business, or anything of that kind, simply going to run forty-three cars and quit, why, it could be

(Testimony of P. E. Sands.)

done at a very small figure. I think that there would be some expenses added to this. I think fifty dollars a month—do you want me to criticise these amounts here?

Q. Yes.

A. I think fifty dollars a month advertising is very small; and such expenses as light—I don't know whether they had any power or not in their place, electricity. And there is always an expense for what we call "policy" work—free repairs. That is quite an item, and every sale that is made is subject, in most places, to a five per cent, at least, commission.

Q. What do you think about that item they have down there for demonstration?

A. Well, that would depend altogether on how many demonstrating cars they ran.

Q. What is the average cost of demonstrating?

A. I would say thirty dollars would run one car a month. In other words, thirty dollars a month would pay the upkeep cost of one demonstrator, keeping it in condition, [258] buying the gasoline and oil, and so forth, provided they sold that car before the tires wore out.

Q. Now, assume that the company was not going to sell just these forty-three machines, but expected to continue business, what would you say, then, as to those costs, as to those items there?

A. Well, I should say that some of this would be about twenty-five per cent of what it ought to be.

Q. Some of those items there are about one-fourth

(Testimony of P. E. Sands.)

of what they ought to be?     A. Yes, sir.

Q. Which ones, for instance?

A. I don't know. I have added these up. They amount to about \$550.00. And my experience in running an automobile business is that \$2,000.00 a month expense is very, very small, and a concern that equips itself to sell even a hundred cars a year, and it could be expected to take in trade seventy-five automobiles, or fifty perhaps, to market those, in selling those hundred would have to have an organization that would certainly cost at least \$2,000.00 a month.

Q. About \$2,000.00 a month. And if that forty-three machines could be sold in the period of five months the cost of selling these might amount to as much as \$10,000.00, that is, the garage cost?

A. No, I wouldn't say that. I will qualify that, as I did in the first place. If they expected to sell those cars and quit—

Q. Yes, but I am assuming they would pay out about \$10,000.00 from the time they started selling them to the time they [259] quit selling them if they kept the business going, and so forth?

A. Yes, if they kept on going, expecting to do business.

Mr. IVEY.—That is all.

Cross-examination.

(By Mr. HALVERSTADT.)

Q. How many salesmen would it take to sell forty-three cars, Mr. Sands, according to the figures you are giving us? \$2,000.00 a month overhead?

(Testimony of P. E. Sands.)

A. In what length of time?

Q. From February 22, 1915, to July 31, 1915.

A. Why, it wouldn't take more than one.

Q. It would take more than one? A. No.

Q. Suppose you had more orders on hand than you could fill, how many salesmen would it take? None, wouldn't it?

A. No, if you had them all sold it wouldn't take any.

Q. Suppose you had more orders on hand than you could fill, would you as an experienced automobile man, say you should go ahead with a heavy advertising business? A. No.

Q. Now, as a matter of fact, what a business of that sort would cost depends on innumerable conditions, doesn't it? A. Yes.

Q. None of which have been mentioned here, or at least just a very small fraction of them, doesn't it? Just a very few of the conditions mentioned here which you would have to have to give a reasonably intelligent answer to those questions, isn't that true? [260]

Mr. HALVERSTADT.—Yes. I move to strike the witness' testimony.

The COURT.—The motion is denied.

Mr. HALVERSTADT.—Very well. I will go further.

Q. Now, what particular items are too low, Mr. Sands?

A. Well, there are no items mentioned except rent and salaries and telephone and toilet.



(Testimony of P. E. Sands.)

Q. All right.

A. I don't know of any automobile business that can get away with that kind of expense; I never heard of one.

Q. Do you know anything about or were you acquainted with the Harmon Motor Car Company's business at that time?     A. No, sir.

Q. Knew nothing about it?     A. No, sir.

Q. Didn't know anything about their internal organization?     A. No, sir.

Q. And yet you would be willing to say on your oath that that business, for that length of time and for that purpose, couldn't be run on that monthly expense?

A. Do you want me to say what I think? That's all I can say.

Q. Well, if I understood the Court's ruling you are not giving expert testimony.

The COURT.—His best judgment.

A. Well, my best judgment is just as I have testified, that he could not.

By Mr. HALVERSTADT.—(Q.) Now, as a matter of fact, the list of expenses that were given here total \$790.00; they are not all on there. You think that is way out of proportion, do you? [261]

A. \$790.00 a month? Yes, I do.

Q. And you still think that it would take about \$2,000.00 a month to sell those cars during that time when you had more orders than you could fill?

A. I qualified my answer by stating if a man expected to keep on doing business.

(Testimony of P. E. Sands.)

Q. Well now, leave that out of the question. Suppose you have before you an established business for the purpose of selling forty-three more cars; now, what would you say would be the fair monthly expense for that purpose? Now, isn't it true, Mr. Sands, that you can't tell on the facts that have been put before you? A. No, I can't tell exactly.

Q. And isn't it true that nobody else could tell on the facts that have been put before you?

A. I don't know.

Mr. HALVERSTADT.—That is all.

Redirect Examination.

(By Mr. IVEY.)

Q. You mean to say you can't tell exactly what it would cost?

A. No, I didn't say that. I say I can't tell what it would cost the Harmon Motor Car Company, as I understood his question.

Q. No, you misunderstood counsel's question. The question was what it would cost, generally speaking, that is the question he asked you, what it would cost generally speaking.

A. Well, generally speaking is, I think, too general. If I had forty-three cars to sell I could go out and sell them [262] myself on my own initiative and have no other expense, but if I have got a business to maintain and an organization to maintain while I am doing that, then there is expense.

Q. That is the expense you were testifying about a few minutes ago? A. Yes, sir.

Q. You are assuming you had a garage such as

(Testimony of P. E. Sands.)

you have here in Seattle—

A. I am assuming that we have a garage with a service car, with service men, with salesmen, with advertising expense, and policy repair expense, and light, heat, and power bills, and the stock of parts to maintain, and the various other expenses that go with the automobile business, a going concern.

Q. And that you expect to conduct your business in such manner as would be customary after that period expired? A. Exactly.

Q. And it is upon that assumption you made the answer you did to the effect this would cost about \$2,000.00 a month? A. Yes, sir.

Mr. IVEY.—That is all.

Recross-examination.

(By Mr. HALVERSTADT.)

Q. What amount of advertising were you considering a month in dollars and cents in your \$2,000.00 expense? A. A hundred and twenty-five dollars.

Mr. HALVERSTADT.—That is all.

(Witness excused.)

Court adjourned until Tuesday morning. [263]

**Testimony of W. J. H. Clark, for Defendant  
(Recalled).**

W. J. H. CLARK, recalled as a witness on behalf of the defendant, further testified as follows:

Direct Examination (Resumed).

(By Mr. IVEY.)

Q. Mr. Clark, have you with you now the records showing how many Reo automobiles you sold to your

(Testimony of W. J. H. Clark.)

different subagencies during the period between October, 1914, and July, 1915? A. Yes.

Q. Will you produce those records?

A. They are in that case back of you tied up with string, Mr. Ivey.

Q. You needn't unwrap them until it becomes necessary for an inspection of them. Does that show the disposition, Mr. Clark, of the entire quantity of Reos that you got during that period? A. Yes, sir.

Q. And is that the entire quantity of Reos that you were able to get from the factory during that period? A. Yes, sir.

Q. What do you call those sheets that you have?

A. These are the sales order sheets.

Q. Well, tell us, Mr. Clark, what a sales order sheet is?

A. It's our original record, the Northwest Auto Company, of the sale of these machines to the various parties.

Q. Who makes out that sheet, you or the purchaser?

A. The most of these are made out by me and the others were made out by the bookkeeper, who was under my authority.

Q. And that is the original record that you keep of those [264] transactions?

A. Absolutely.

Mr. IVEY.—I believe, Mr. Halverstadt, you were willing the other day for Mr. Clark to tell how many of these Reos went to the successors of the Harmon Motor Car Company?

(Testimony of W. J. H. Clark.)

Mr. HALVERSTADT.—At this time I don't see the materiality of it. I call counsel's attention now to the provision of the contract that he has pleaded, as follows: "And the shipment of such Reo automobiles covered by this contract is to be made as above specified, subject to the prior orders of other dealers." Now, show by Mr. Clark what orders you had prior to October 17, 1914.

By Mr. IVEY.—(Q.) This shows all of the orders, does it not, Mr. Clark?

A. All of the orders, yes.

Mr. IVEY.—That is the whole thing right there. I can have Mr. Clark figure that out.

Mr. HALVERSTADT.—I would like to know how many orders they had received prior to the making of this contract.

By Mr. IVEY.—(Q.) Can you make—

A. This can be made from these without any difficulty.

By Mr. HALVERSTADT.—(Q.) Pick out the orders yourself?

A. Oh, yes.

By Mr. IVEY.—(Q.) When do those orders date from?

A. They date from the 7th day of August, 1914.

Q. 7th day of August, 1914. Would it take you very long, Mr. Clark, to tabulate that for us?

A. No, it wouldn't take more than fifteen or twenty minutes.

Q. Let's see what they look like (examining

(Testimony of W. J. H. Clark.)

same). Are they arranged in chronological order?  
[265]

A. Chronological order, yes. I will point out, Mr. Ivey—there is more than one machine on each order. In some cases there are four.

Q. How many altogether are there in here?

A. Altogether? Machines?

Q. Yes.

A. I think somewhere around about three hundred and seventy-five.

Q. Three hundred and seventy-five?

A. I think so; something like that.

Q. And how many did your contract from the factory call for? A. Four hundred and fifty.

The COURT.—He can tabulate that while we are transacting some other business.

The WITNESS.—I can tabulate it in fifteen or twenty minutes.

Mr. IVEY.—I offer this entire bunch of order sheets, your Honor, please, in evidence.

Mr. HALVERSTADT.—Now, we object to them, your Honor, because the only object there could be is to show, according to their contract, that at the time they made this contract with us there were so many prior orders which they had received that they couldn't fill them. The language is "subject to prior orders of other dealers." Now, only those orders which were received prior to that time are material or admissible. We object to the rest.

The COURT.—Those which are prior to this may be admitted.

(Testimony of W. J. H. Clark.)

Mr. IVEY.—Well, if your Honor please, my object, in addition to showing that phase of the matter, is to show all the orders we did get, and the dates on which we got those orders, and the dates on which we filled the same. [266] Now, the orders that were to come from the Harmon Motor Car Company, they were to be put in thirty days beforehand, and any order that we got, say, for instance, in March, 1915, certainly in February, 1915, would be material to show what disposition we were making of the machines that we were getting from the factory. Now, before making any further offer of this entire set of orders I will ask the witness if he has the contracts that he had with his different sub-agencies during that period for Reo machines?

A. Yes.

Q. Did you bring those contracts? A. Yes.

Mr. IVEY.—I withdraw the offer of these documents at this time for the purpose of examining the witness on those contracts.

Q. Will you produce all the other contracts you had, Mr. Clark, for the Reo machines?

A. (Witness produces papers.) They are in chronological order, too.

Q. How many are there, Mr. Clark?

A. There is probably forty or fifty, but not many of them prior to the date of the contract with the Harmon Motor Car Company.

Q. This bunch of contracts that you have here were all the contracts that you had during that period? A. Yes.

(Testimony of W. J. H. Clark.)

Q. This runs from August 7, 1914? A. Yes.

Q. To— A. July,— [267]

Q. All of them prior to July 31, 1915? A. Yes.

Mr. IVEY.—I offer this bunch of contracts in evidence.

Mr. HALVERSTADT.—We have no objection to so many of those contracts as were entered into prior to the date the contract in suit was entered into. All the others we object to as incompetent and irrelevant.

Mr. IVEY.—I think, your Honor, please, counsel is mistaking the term “prior orders” with “prior contracts.”

Mr. HALVERSTADT.—I have no objection to any of those contracts going in evidence which were executed prior to the contract in suit.

Mr. IVEY.—I am talking about prior orders and counsel is talking about prior contracts. Now, your Honor will recall that this contract provided that unless orders are put in for machines they don't have to be furnished. It isn't a question of whether we had contracts for the entire quantity of machines we were going to get from the factory. Every one of those contracts, certainly those contracts I have examined, and presumably these, too, provide that unless the agencies put in orders for machines we can dispose of them in some other kind of way. Now, I am going to show, your Honor, that we had orders for a great number more machines than we could get, and the outstanding contracts we had were for more machines than we could get from the



(Testimony of W. J. H. Clark.)

factory. That is the purpose of introducing all of these contracts.

The COURT.—I presume the Court would have to regulate the matter by instructions anyhow when you get all the evidence in and tell the jury what they can and cannot [268] consider in relation to those contracts, and I presume to get the view of both sides properly before the jury and the Court perhaps they may be filed.

Mr. HALVERSTADT.—We except to the ruling in so far as it admits any orders which are subsequent to the date of the execution of the contract in question.

The COURT.—Yes.

Mr. HALVERSTADT.—Any contracts, I mean, instead of orders.

Contracts referred to received in evidence, marked Defendant's Exhibit "C" and made a part of the record herein.

Mr. IVEY.—I now offer in evidence this entire lot of sales orders to show what we were able to do with this entire lot of contracts.

Mr. HALVERSTADT.—I make the same objection.

The COURT.—Be the same ruling, subject to the possible withdrawal of some of those contracts in consideration for the jury when finally submitted to them.

Mr. HALVERSTADT.—I save the same exception to the ruling of the Court.

The COURT.—Yes.

(Testimony of W. J. H. Clark.)

By Mr. IVEY.—(Q.) Do you know, Mr. Clark, how many automobiles were contracted to be sold by your company in all of those contracts; have you added them up?

A. No, sir, I have not, Mr. Ivey.

Q. I wish you would do that after you get off the stand.

A. I can do that, yes.

Q. And also tabulate this other matter for us.

A. Yes.

Mr. IVEY.—That is all, Mr. Clark.

Mr. HALVERSTADT.—Will you let him add that up and let me cross-examine [269] him all at once?

Mr. IVEY.—Yes.

(Witness excused.)

**Testimony of F. W. Vogler, for Defendant  
(Recalled).**

F. W. VOGLER, a witness for the defendant, recalled on behalf of the defendant, further testified as follows:

Direct Examination.

(By Mr. IVEY.)

Q. Mr. Vogler, the other day when you were on the stand I asked you if there were any additional conversations besides those that you mentioned that you had had with Mr. Harmon regarding the conduct of this business. At that time you didn't seem to recall any more. Do you now recall any more?

A. Why, yes, there were on several occasions.

(Testimony of F. W. Vogler.)

Mr. Harmon's conduct was not such that we desired of an agent.

Mr. HALVERSTADT.—What is that answer, please?

A. I said that his conduct was not such as we desired of a representative.

Mr. HALVERSTADT.—I move to strike that.

The COURT.—That will be stricken and the jury will disregard the answer. The question was, What was said?

By Mr. IVEY.—(Q.) State what it was he said and what occurred between the two of you. [270]

A. Oh. On one occasion during—

Mr. HALVERSTADT.—(Q.) When was that, before or subsequent to his severing his relations with the company?

A. It was in January, 1914, as I remember it, during an automobile show. Mr. Harmon appeared at the exhibition intoxicated. Any time he appeared there he was in an intoxicated condition. We remonstrated with him and asked him if he wouldn't keep away. It seems he didn't want to keep away, but kept around there. Some of us salesmen finally took him away. I had a talk with him at that time and told him that it was absolutely useless for us to continue on if his actions would continue in that way. And another case, one morning I came down from Spokane early in the morning—

Mr. HALVERSTADT.—(Q.) When was that?

A. That was in—either the latter part of September or first of October.

(Testimony of F. W. Vogler.)

By Mr. IVEY.—(Q.) Was it before or after the entering into this contract?

A. To my best ability it was after.

Q. After entering into the contract?

A. Yes. I came in there one morning and asked where Harmon was,—

Mr. HALVERSTADT.—(Q.) Did you state what time that was?

Mr. IVEY.—He said it was after the entering of the contract.

Mr. HALVERSTADT.—Was it before Mr. Harmon severed his relations with the company?

The COURT.—It was in October, he said.

Mr. HALVERSTADT.—Oh, I didn't understand him. October, 1914?

A. Yes. I seen where Mr. Harmon was, and the washer, or some [271] employee around there said—

Mr. HALVERSTADT.—Just a minute. That is hearsay. Object to it on that ground.

Mr. IVEY.—You were just asked to state what occurred as between you and Mr. Harmon, where you found him, if you found him, or what he said, if he said anything. You can't testify to what somebody told you except Mr. Harmon himself.

A. Just where he was?

Q. No, you can't testify to your making inquiries where he was.

A. I found him in the tonneau of the car with a couple of girls. I don't know the names of the girls, but he was in there.

(Testimony of F. W. Vogler.)

Q. Where was that?

A. That was in the garage or the warehouse of their—where they keep their cars, where they kept their cars covered over, some of them.

Q. What time of the day was that?

A. It was early in the morning.

Q. Well, did you have any conversation then with Mr. Harmon about that?

A. Not at that time; no.

Q. Well, what condition was Mr. Harmon and these two girls in?

A. Well, I wouldn't say that; I couldn't say that.

Q. You will have to speak louder.

A. I wouldn't say what condition he was in.

Q. You say you had no conversation with him at that time?     A. Not at that time.

Q. Well, did you have a conversation—

A. Later I simply brought those matters up to him. This was done time and again, and I told him that his actions would [272] have to improve.

Q. Well, did you speak to him at any time about this particular incident, finding him there with those two girls?

A. I don't know as I mentioned that particular instance to him. I didn't—

Q. Is there any other thing that you recall at this time that occurred between you and Mr. Harmon?

A. Why, I can't state just the particular time, but all during that contract I would have talks with Mr. Harmon and ask him why he carried on and didn't tend to his business in better shape than he did. He

(Testimony of F. W. Vogler.)

would promise me that he would try to do it. I said, "If you will do it we will continue it, but if you don't we will simply be compelled to get representation here. You are doing yourself no good, you are doing us no good and as a business proposition you can't put it over and continue with your present contract."

Q. Where was that show that you spoke of a while ago? A. I think it was in the armory.

Q. Armory? A. Yes.

Q. What kind of show was that?

A. It was an automobile show.

Q. Were the Reos being exhibited there?

A. Yes.

Mr. IVEY.—I think that's all.

Cross-examination.

(By Mr. HALVERSTADT.)

Q. Mr. Vogler, this automobile show was in January, 1914, was [273] it not?

A. No, it was—I am mistaken there. It was—

Q. All right. Now, tell us when it was.

A. As far as I can remember, it was the following year, 1915, as far as I remember.

Q. Now, you are perfectly sure that it was in the year 1915, January, are you, the early part of the year 1915?

A. As near as I can remember it at this time it was.

Q. Now, Mr. Vogler, don't you know there was no automobile show held here in the year 1915? Now, don't you know that to be the fact?

(Testimony of F. W. Vogler.)

A. No, I don't. My remembrance is that that was the year.

Q. All right then, we will put it this way: The occasion you spoke of was at an automobile show held here, was it not?

A. In that case where he was intoxicated during the whole show was, yes.

Q. And if there was no automobile show held here in 1915 then you are mistaken as to the occasion, are you not?

A. Well, as I said before, my remembrance is in 1915.

Q. Yes. Now, Mr. Vogler, let me ask you another thing. This I should have asked him the other day. May I ask him now?

Mr. IVEY.—Sure.

By Mr. HALVERSTADT.—(Q.) You spoke of a conversation you had with Mr. Harmon at the Washington hotel after he had severed his relations with the company. Now, at that time did you not tell him, in substance, this: That you thought it would be advisable if he would leave the business for a while, but that Mrs. Harmon might go ahead and conduct the business as theretofore? [274]

A. I don't know. No, I don't recall any such conversation.

Q. But would you swear positively that was not said by you, in substance?

A. I might have said, and I did say, that I felt very sorry for Mrs. Harmon, and had made a proposition to her that if she could reorganize her company and

(Testimony of F. W. Vogler.)

furnish the capital that we would consider it.

Q. You are talking now about what you said to Mrs. Harmon?

A. I am talking now about what I said to Mr. Harmon at that time. Mr. Harmon, as I said the other day, *through* up the sponge and said that he was ready to quit.

Q. Mr. Vogler, I believe you said the other day that you asked Mrs. Harmon if you might go down to the bank, and she said yes? A. Yes.

Q. And that you went down? A. Yes.

Q. Now, when you returned did you tell Mrs. Harmon what the bank officials had told you?

A. Yes, sir.

Q. What did you tell her?

A. I told her I went before the bank officials and laid the case before them, and asked them if there was any chance for them to help Mrs. Harmon out, and they said absolutely not. As I recall it, he claimed that they owed something at that time.

Q. Mr. Vogler, I call your attention to a number of letters here marked Plaintiff's Exhibit "14," and I will ask you whose signatures appear on all those letters? A. Mr. Clark. [275]

Q. And Mr. Clark, the gentleman who testified here, is the Secretary of the company? A. Yes.

Mr. HALVERSTADT.—We offer these in evidence as Plaintiff's Exhibit "14."

Mr. IVEY.—Object to them, your Honor, please, upon the ground that they are immaterial for the reason that these letters were written between May



(Testimony of F. W. Vogler.)

1st, 1914, and July 22, 1914, and the contract in question was entered into in October, 1914. That contract provides that all of the prior agreements made between the parties with reference to the Reo machine are incorporated in that contract itself. I haven't read these letters through.

The COURT.—What is the purpose of these letters?

Mr. HALVERSTADT.—You will recall that the testimony was, on behalf of the plaintiff, that the bank had made the same agreement for this year that had existed the prior year. These letters indicate what that agreement was and what the practice was in all regard during that year.

Mr. IVEY.—That is the plaintiff's testimony you are talking about now, isn't it?

Mr. HALVERSTADT.—Yes.

Mr. IVEY.—The plaintiff can prove that agreement anyway he wants to.

The COURT.—Sustained.

Mr. HALVERSTADT.—Exception. That is all.

Mr. IVEY.—That is all.

(Witness excused.) [276]

### **Testimony of H. C. Harriss, for Defendant.**

H. C. HARRISS, produced as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. IVEY.)

Q. Mr. Harris, give your full name, please.

(Testimony of H. C. Harriss.)

A. H. C. Harriss.

Q. What is your business, Mr. Harriss?

A. Salesman for the Reo Motor Car Company.

Q. How long have you been salesman?

A. Since about September, 1912.

Q. Been continuously with this company during that time?     A. Yes.

Q. You were with the company, then, in the season of 1914 and '15?     A. Yes.

Q. Were you at the factory any time during that season?

A. Yes, I was there during July, August and September, that is, till about the middle of September. Not continuously. I spent part of the time in Ohio, but I left the factory for the west about the middle of September, 1914, and returned there, I think in December, I think it was December, or early in January; I am not certain.

Q. Do you know what conditions prevailed around the factory at that time with reference to the manufacture of the Reo machines?

Mr. HALVERSTADT.—Now, what time?

Mr. IVEY.—During the season of 1914 and '15.

Mr. HALVERSTADT.—He testified, if I recollect, that he was at the factory during what months of 1915? [277]

Mr. IVEY.—'14, I think.

A. Well, he asked me about '14. The '14-'15 season—our season, by the way, starts on the 1st of August, that is, our contracts with our distributors

(Testimony of H. C. Harriss.)

are made on the 1st of August of each year; or fiscal year starts then.

Q. Well then, you can answer that question as to whether or not you were familiar with the conditions there governing the manufacture of the Reo machines during that time generally.

Mr. HALVERSTADT.—That is incompetent, irrelevant and immaterial under the amended pleading.

The COURT.—He may answer.

Mr. IVEY.—I withdraw the question and ask you this question:

Q. Do you know whether or not the factory, during that season, turned out as many cars as they had contracted to turn out?

Mr. HALVERSTADT.—We object to that. That is incompetent, irrelevant and immaterial, and is not included within the exception.

Mr. IVEY.—Well, I am laying a foundation, your Honor, please, and am going to ask him why.

The COURT.—He may answer.

A. The factory have never filled their contracts; they never have built as many cars as they have contracted for.

The COURT.—Confine your answer to the year he is inquiring about.

A. Well, during 1914-'15 season the factory did not build as many machines as they contracted to sell.

By Mr. IVEY.—(Q.) Do you know why they didn't?

A. Well, they closed their factory in July, about

(Testimony of H. C. Harriss.)

the 1st of [278] July, for inventory.

Q. For what?

A. Inventory. They take inventory, and also make repairs on the machinery, and it was their intention to start building on the 1st of September. And later they announced that they would—

Mr. HALVERSTADT.—We object to that; that is hearsay.

Mr. IVEY.—You can't say what they announced, but just say why they didn't manufacture them.

A. Well, they did not have the material at that time. This was a statement made to me by Mr. Scott.

Mr. HALVERSTADT.—Now, we object to that as pure hearsay and move to strike the testimony.

The COURT.—It is stricken.

Mr. IVEY.—You can't make a statement as to what somebody told you, but you have to state the facts as they were. What was the reason?

Mr. HALVERSTADT.—If you know.

A. They were making changes at that time in the model of the car, building a new six-cylinder car, and also changing the four-cylinder car, and the details that always come up on account of changes was responsible chiefly for the delay in manufacturing.

By Mr. IVEY.—(Q.) Now, you spoke of being a little short of some materials. Why didn't they order the materials?

Mr. HALVERSTADT.—(Q.) Now, do you know of your own personal knowledge that they didn't order material?

(Testimony of H. C. Harriss.)

A. I know of my own personal knowledge that they did not have the materials.

By Mr. IVEY.—(Q.) Do you know why they didn't proceed to use [279] more efforts to get them than they did?

Mr. HALVERSTADT.—Now, that will not excuse them under the exception. Object to it as incompetent, irrelevant and immaterial.

Mr. IVEY.—I withdraw the question.

Q. Do you know of any other reasons than those that you have stated as to why they weren't able to fill the orders? A. No, I do not.

Mr. IVEY.—That is all.

Mr. HALVERSTADT.—No cross-examination.

(Witness excused.)

Mr. IVEY.—I think you may now cross-examine Mr. Clark, Mr. Halverstadt.

Mr. HALVERSTADT.—If the Court please, at this time I want to move to strike all the testimony of this last witness in so far as it was sought thereby to prove the affirmative defense which was permitted to be made during the trial, on the ground that it is incompetent, irrelevant and immaterial, and is not included within the exception of the contract. Now, if the factory didn't order their material, that is not mentioned here; if the factory changed their model and laid down on the job, that is not mentioned here; if the factory took an inventory and killed time, that is not mentioned here; that is not one of the things that is mentioned. The contract is "delays due to strikes, floods, accidents, or any

(Testimony of H. C. Harriss.)

other causes [280] beyond the control of the manufacturer or seller." Now, purely those certainly were within its control. The next of it is "whether occurring in the plant of the manufacturer, or in that of any concern from which the manufacturer or seller purchases parts or equipments." There is no offer of any testimony on the last. "And the shipment," and so on, "is subject to prior orders." Now, we move to strike out all of the testimony as incompetent, irrelevant and immaterial, and tending to prove no issue whatever in this case.

(Argument.)

The COURT.—I think the testimony may stand. Some of it may not all be material, but I can't take it all from the jury. The motion is denied.

Mr. HALVERSTADT.—Exception.

**Testimony of W. J. H. Clark, for Defendant  
(Recalled).**

W. J. H. CLARK, a witness for the defendant, recalled for cross-examination further testified as follows:

Cross-examination.

(By Mr. HALVERSTADT.)

Q. Mr. Clark will you produce the agency contracts which were entered into prior to October 17, 1914, that is, this Harmon Motor Car Company contract? A. To October 17th?

Q. Yes. Produce all the prior agency contracts; produce all the agency contracts which were prior

(Testimony of W. J. H. Clark.)

to that, even if [281] executed on the same date, but earlier. (Witness produces papers.) Now, those are the contracts that you handed me?

A. Those are prior to October.

Q. Now, the first is the contract between Northwest Auto Company and Neuman Brothers?

A. Yes, sir.

Q. Dated August 7, 1914? A. Yes.

Q. The next is the contract between Northwest Auto Company and Rowan Auto Company, dated September 4, 1914? A. Yes.

Q. The next is the contract between Northwest Auto Company and Bell-Wyman Employment Company, dated September 5, 1914. And the last one is Northwest Auto Company to Fifth Avenue Auto Supply Company, dated October 15, 1914?

A. Yes, sir.

Q. Now, these four contracts which I have just mentioned are the only contracts which were entered into prior to the Harmon Motor Car Company contract in suit? A. Yes.

Mr. HALVERSTADT.—I offer these in evidence.

Mr. IVEY.—They already have been introduced.

Mr. HALVERSTADT.—All right.

Q. Now, Mr. Clark, produce what you call orders as distinguished from contracts which were prior in point of time to this contract in suit.

A. Prior to—

Q. October 17th. A. Yes, sir.

Q. Pick out each particular one. [282]

A. Surely. That was October 17th, wasn't it?

(Testimony of W. J. H. Clark.)

Q. October 17th.

A. I think that's all—yes. (Witness produces papers.)

Q. Now, this first was dated August 7, 1914, and was for one car, was it not? A. One car, yes.

Q. And the next one was dated August 7, 1914, for one car? A. Yeh.

Q. The next is August 13th.

A. For one car.

Q. For one car. The next is August 18th for four cars? A. Yeh.

Q. The next is August 26th for four cars?

A. Yes, sir.

Q. The next is August 29th for one car?

A. Yes, sir.

Q. The next is September 25th for—

A. Four cars.

Q. Four cars. The next is September 12th for two cars, correct? A. One car.

Q. For one car. Next is September 14th for one car? A. Yes, sir.

Q. Next is September 16th for four cars?

A. Yes, sir.

Q. Next is September 16th for— A. One car.

Q. For one car. Next is September 15th for one car? A. Yeh.

Q. Next is September 28th for one car? [283]

A. Yeh.

Q. Next is September 28th for one car?

A. Yeh.

Q. Next October 1st, one car? A. Yeh.



(Testimony of W. J. H. Clark.)

Q. Next October 8th, one car? A. Yeh.

Q. Those are all? A. Those are all.

Q. Now, outside of those contracts which you have specified and these orders which you have just specified your other contracts and your other orders were taken subsequent to the Harmon Motor Car Company contract which is in suit here? A. Yes, sir.

Mr. HALVERSTADT.—That is all.

Mr. IVEY.—You have no further examination?

Mr. HALVERSTADT.—No. Just wait a minute. Oh yes, one thing else.

Q. How many automobiles did the factory deliver to the Northwest Auto Company between October 17, 1914, and July 31, 1915? A. Between when?

Q. October 17, 1914, and July 31, 1915, the date of the life of the Harmon contract. How many?

A. About three hundred and fifty.

Mr. HALVERSTADT.—That is all.

By Mr. IVEY.—(Q.) How many did you say you had contracted for? A. Four hundred and fifty.

Mr. IVEY.—That is all.

(Witness excused.) [284]

**Testimony of F. E. Harmon, for Defendant.**

F. E. HARMON, a witness for the plaintiff, recalled on behalf of the defendant, further testified as follows:

Direct Examination.

(By Mr. IVEY.)

Q. Mr. Harmon, did you file an income tax report for the year 1914? A. In the year 1914?

(Testimony of F. E. Harmon.)

Q. Yes. A. I think we did.

Q. Do you know whether you did or not?

A. I am pretty sure we did.

Q. Will you say positively whether you did or not?

A. If I remember correctly, when that matter came up I simply turned that thing over to my attorney, if I remember correctly.

Q. Who was your attorney at that time?

A. Dan Landon.

Q. You don't know whether you filed one or not, then? A. I hardly think I did.

Q. You say you think you did?

A. I hardly think I did.

Q. You mean you did not, then?

A. I hardly think I made it up myself.

Q. You know what you mean by filing?

A. Yes, I know what you mean.

Q. You swear to the income you made during the past year, and that, then, is filed in the proper office?

A. I think that I did.

Q. You filed it in the office of the Internal Revenue? [285]

A. I think Mr. Landon did.

Q. What does that show for that year?

A. The figures I don't remember.

Q. Where did you get your data from to make that up? A. From my books, I presume.

Q. Got it where? A. From my books.

Q. From your books. These same books that we have here? A. No. You say in 1914?

Q. Yes.

(Testimony of F. E. Harmon.)

A. Yes, from those books there in 1914, from part of them. What month is that filed?

Q. To be filed March, 1915.

A. To be filed March, 1915?

Q. Be filed prior to March, 1915.

A. Then I didn't file.

Q. You did not? A. No, I did not.

Q. Did the Harmon Motor Car Company file one?

A. They did not.

Q. Did Mrs. Harmon file one?

A. She did not.

Q. Did you ever file one in your life?

A. Yes, sir.

Q. When? A. 1914, I think.

Q. In the year 1914? A. Yes, sir.

Q. That was for the business of 1913?

A. I think so. [286]

Q. You know what return you made?

A. I do not.

Q. Do you know where you got your data to make it up? A. Do I know which?

Q. Where you got your data to make it up?

A. I don't know as I have, no.

Mr. IVEY.—That's all.

Cross-examination.

(By Mr. HALVERSTADT.)

Q. Mr. Harmon, will you state to the jury—now, this is merely preliminary, Mr. Ivey—what two makes of cars were principally sold prior to selling the Reo?

(Testimony of F. E. Harmon.)

Mr. IVEY.—Object to that as not proper cross-examination.

Mr. HALVERSTADT.—It is merely preliminary to answer question.

The COURT.—I didn't get the question. (Question repeated.)

Mr. HALVERSTADT.—It is merely preliminary to another question that will follow.

Mr. IVEY.—I withdraw that objection, because Mr. Halverstadt can put him on the stand anyway if he wanted to.

The COURT.—All right.

A. Not any two makes, Mr. Halverstadt, only one make, and that is the Interstate. I took the Lozier and Reo at the same time.

Q. Now, what happened, if you know, to the factory of the Interstate?

A. They failed along in July, 1915, or 1913.

Q. Did it leave the Harmon Motor Car Company with any cars on its hand?

A. It left us with about twenty-three cars on hand.

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Q. What happened by that failure to the retail sale value of those cars?

Mr. IVEY.—Object to that, your Honor, please, as calling for a conclusion.

Mr. HALVERSTADT.—I withdraw it.

Q. After that failure could you sell those cars for as much as before?

A. We sold them for about fifty per cent of what we did before.

(Testimony of F. E. Harmon.)

Q. And is that the most you could get for them?

A. Yes, sir.

Q. Why?

A. On account at that time everybody was under the impression they wouldn't be able to get parts and service; and the agency, of course, with the factory out of business the agency would naturally be discontinued.

Q. What was the sale price of those Interstate per car?

A. From twenty-four hundred to thirty-four hundred.

Mr. IVEY.—Your Honor please, I object to that. They are going now entirely without the issues.

The COURT.—I think so.

Mr. HALVERSTADT.—May I put one other question merely for the record?

The COURT.—Very well.

By Mr. HALVERSTADT.—(Q.) What amount in money did the Harmon Motor Car Company lose as a result of the failure of that company?

Mr. IVEY.—I object to that.

The COURT.—Sustained.

Mr. HALVERSTADT.—Exception. That is all.

(Witness excused.) [288]

**Testimony of F. W. Vogler, for Defendant  
(Recalled).**

F. W. VOGLER, a witness for the defendant, recalled by the defendant, further testified as follows:

Direct Examination.

(By Mr. IVEY.)

Q. Mr. Vogler, referring to that show that you thought was in 1915, after refreshing your recollection what do you think about it now?

A. Why, after thinking it over and calling up—

Q. Speak louder, please.

A. After thinking it over and calling up some information, why, I wouldn't say positively it was 1915. I have so many things to think about I sometimes get these things mixed up; but it might have been in 1914.

Mr. IVEY.—That is all.

Cross-examination.

(By Mr. HALVERSTADT.)

Q. You are inclined to think it was, are you not, in 1914?

A. I called up two different parties this morning, since I testified, and one said 1915 and the other said 1914.

Q. Mr. Vogler, here is one question I can ask now. Mr. Sands, or his company, is the agent for the Marmon car here, isn't he?

A. Yes, he is the agent.

Q. Now, under whom does he work, Northwest Auto Company, your company?     A. No, sir.

(Testimony of F. W. Vogler.)

Q. He does not? A. He does not. [289]

Q. You are also the agent for the Marmon car, are you not, Northwest Auto Company?

A. We are distributors; yes.

Q. And Mr. Sands gets his cars through you?

A. No, sir, unless we feel like giving them to him. Absolutely a separate contract.

Q. Didn't Mr. Sands get a carload of Marmons from you last week?

A. I think he got two or three we let him have for accommodation, as we let any distributor have.

Mr. HALVERSTADT.—That is all.

Mr. IVEY.—That is all.

(Witness excused.)

Mr. IVEY.—If your Honor please, with the exception *one* one witness who is not here yet we are through.

Mr. HALVERSTADT.—If counsel desires I will go ahead with the rebuttal until his witness comes.

Mr. IVEY.—I will appreciate it if you will. [290]

**Testimony of Miss Helene H. Wilson, for Plaintiff  
(In Rebuttal).**

Miss HELENE H. WILSON, produced in rebuttal as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HALVERSTADT.)

Q. Please state your name.

A. Helene H. Wilson.

Q. What is your business, Miss Wilson?

(Testimony of Miss Helene H. Wilson.)

A. Assistant secretary of the automobile club of Seattle.

Q. How long have you held that position?

A. Since the 29th day of December, 1914.

Q. Now, then, do or do not your duties require you to keep track of automobile shows?

A. That is part of the duties of the club.

Q. Do you know of your own knowledge—answer yes or no—whether there was an automobile show in the city of Seattle in the year 1915?

A. There was not.

Q. There was not?      A. No.

Mr. HALVERSTADT.—Cross-examine.

Mr. IVEY.—No cross-examination. I think Mr. Vogler was mistaken, that is all.

(Witness excused.) [291]

**Testimony of J. M. Thornton, for Plaintiff,  
(Recalled in Rebuttal).**

J. M. THORNTON, a witness for the plaintiff, recalled in rebuttal on behalf of the plaintiff, further testified as follows:

Direct Examination.

(By Mr. HALVERSTADT.)

Q. Mr. Thornton, on Friday Mr. Vogler, as I recollect—correct me if that is not true—testified that at the time he was here in Seattle along the first of February, 1915, the relations between yourself and Mrs. Harmon were not harmonious. State to the jury whether or not your relations were or were not harmonious.



(Testimony of J. M. Thornton.)

A. Why, our relations were very pleasant, as I recollect, absolutely.

Q. Was there any trouble between you?

A. Not at all.

Mr. HALVERSTADT.—That is all.

Cross-examination.

(By Mr. IVEY.)

Q. Mr. Halverstadt, I think it was a little later than the 1st of February. What were your relations a little later on in February and up to the 22d, with Mrs. Harmon?

A. I was still around the company.

Q. How is that?

A. I was still connected with the company.

Q. But were your relations with Mrs. Harmon smooth during that entire period?

A. Why, I never had any argument at all with Mrs. Harmon at all.

Q. Didn't have any conversation with Mr. Vogler about your [292] relations not being smooth, did you?

A. As far as Mrs. Harmon was concerned our relations was all right. It was only a matter of business, the same as it was with Mr. Vogler, or anybody else. I spoke to him about business relations. As far as my relations with Mrs. Harmon, they were absolutely pleasant.

Mr. IVEY.—That is all.

Redirect Examination.

(By Mr. HALVERSTADT.)

Q. Was there an automobile show held in the city

(Testimony of J. M. Thornton.)

of Seattle in the year 1915?

A. No, there was not.

Q. When was the last one prior to the year 1915 that was held?

A. There was one in '14.

Q. What month, if you remember?

A. That was in February.

Q. February, 1914? A. Yes, sir.

Mr. HALVERSTADT.—That is all.

Mr. IVEY.—That is all.

(Witness excused.) [293]

**Testimony of F. E. Harmon, for Plaintiff (Recalled in Rebuttal).**

F. E. HARMON, a witness for the plaintiff, recalled in rebuttal as a witness on behalf of the plaintiff, further testified, as follows:

Direct Examination.

(By Mr. HALVERSTADT.)

Q. Mr. Harmon, at the time Mr. Vogler was here during the early part of February, 1915, I believe he testified that he saw you or that you saw him at the Washington Hotel in the city? A. Yes, sir.

Q. That is a fact, is it? A. Yes, sir.

Q. Now, then, state to the jury what, if anything, was said by him as to permitting Mrs. Harmon to keep this contract and carry on the business, and your connection with it, just whatever it was.

Mr. IVEY.—I object to that, your Honor please. This contract is in writing, and Mr. Vogler has already testified that he would have been willing to let

(Testimony of F. E. Harmon.)

Mrs. Harmon run this business, provided she would raise sufficient money. Now, if the testimony of this witness is being brought out for the purpose of showing that there was an actual assignment consented to by Mr. Vogler; I say to your Honor that should have been in writing. There is of record here some kind of an assignment by this witness to the plaintiff in this case of his interest in the business, but I think that inasmuch as the contract itself was in writing, and is of a personal nature, and cannot be assigned without the consent of the Northwest Auto Company, that no oral consent should be permitted [294] at this time. There has been a lot of conversations testified to here and a lot of telegrams, in fact. I will call your Honor's attention to that telegram of February 24th that was sent by Mrs. Harmon to Mr. Vogler, in which she said that she would like to run this business and wanted to know if Mr. Vogler wouldn't wait for a short time to see if she couldn't get sufficient capital together. Here it is. It is in the light of this telegram, your Honor please, that I don't think that any oral testimony should be admitted.

The COURT.—He may answer.

Mr. HALVERSTADT.—Read the question, please.

Q. (Question repeated.)

A. Why, I talked the matter over in general with Mr. Vogler.

Q. State, first, what he said with reference to your connection with it at the Washington hotel.

(Testimony of F. E. Harmon.)

Mr. IVEY.—When was that conversation, Mr. Halverstadt?

Mr. HALVERSTADT.—At the time he was here on this first trip in February, 1915.

Mr. IVEY.—Was that after February 5th?

By Mr. HALVERSTADT.—(Q.) Can you fix the date?

A. Not positively. I think it was on Wednesday. That Wednesday would be about the 3d.

Q. About the 3d? Go ahead. State, first, what he said with reference to your connection.

A. I can't fix the date definitely, but between the 1st and 3d.

Q. That approximately correct?

A. Yes. And I asked him what his ideas were in the matter, and everything like that, and he said that he thought [295] it would be advisable for me to be away from the business for a while. "Well," I said, "If I assign all of my interest and everything to Mrs. Harmon you would have no objection to her continuing the agency?" and he said, "No, absolutely not." The things would remain and the same arrangements would be continued as heretofore.

Mr. HALVERSTADT.—Cross-examine.

Cross-examination.

(By Mr. IVEY.)

Q. You say that was on the 3d?

A. I say it was near there at that time. I wouldn't fix the date exactly. It was within a few days, two or three, of that date, yes.

Q. You wired Mr. Vogler on the 2d, didn't you?

(Testimony of F. E. Harmon.)

A. I think so.

Q. I think that telegram so shows?

A. Yes, probably so.

Q. Mr. Vogler came up here on the 3d, didn't he?

A. I can't say the exact date.

Q. Certainly not earlier than the 3d. How long were you confined in jail before you saw Mr. Vogler after you sent him that telegram?

A. Only one day. I was released the next day.

Q. You were released the next day. That is on the 3d?

A. If I could look up the dates—I was arrested on Saturday night and released on Tuesday afternoon.

Q. Arrested on Saturday night and released on Tuesday afternoon? A. Yes. [296]

Q. Now, you sent Mr. Vogler this telegram on the very night you were arrested, did you?

A. I did not, no.

Q. You sent it later on? A. Yes, sir.

Q. You don't know what day of the week, I mean what day of the month Saturday was?

A. If I could look up the date I think I could almost fix the date, if I could see a calendar.

Q. You are sure you were arrested on a Saturday night?

A. Yes, sir, the 30th of January.

Q. 30th of January? A. Yes, sir.

Q. You are absolutely sure of that?

A. Absolutely.

Q. That was in 1915, was it?

A. Yes, sir.

(Testimony of F. E. Harmon.)

Mr. IVEY.—No further examination.

Redirect Examination.

(By Mr. HALVERSTADT.)

Q. Mr. Harmon, who was the surety on your bond by which you secured the release?

A. Mike Cohan and W. L. Collier, cashier of the Northern Bank.

Q. Cashier of the Northern Bank?

A. Yes, sir.

Q. Had you been acquainted with him theretofore? A. Collier?

Q. Yes.

A. Why, I done business with him for several years at the [297] bank, yes.

Q. And he was the man with whom this arrangement was made for the lifting of drafts?

A. Yes, sir.

Mr. HALVERSTADT.—That is all.

Recross-examination.

(By Mr. IVEY.)

Q. That is the same bank that went into the hands of a receiver here some time ago? A. It is.

Q. The same Collier who went to Walla Walla?

A. It is.

Mr. IVEY.—That is all.

(Witness excused.) [298]

**Testimony of Mrs. Gertrude Harmon, for Plaintiff  
(Recalled in Rebuttal).**

Mrs. GERTRUDE HARMON, the plaintiff, recalled in rebuttal as a witness on her own behalf, further testified as follows:

Direct Examination.

(By Mr. HALVERSTADT.)

Q. Mrs. Harmon, when Mr. Vogler was here during the first part of 1915, that first occasion when he was here, did you see him subsequent to that and prior to the time of the cancellation of the contract?

A. I don't recall seeing Mr. Vogler between around the first week of February and after the cancellation.

Q. Now, when he was here at that time what did he say with reference to permitting you to continue the business?

Mr. IVEY.—Just a minute. What particular time was that? A. The first time.

Mr. HALVERSTADT.—The first time when he was here. She testified she saw him only the first time he was here.

The WITNESS.—The first week in February.

By Mr. IVEY.—(Q.) The first week in February?

A. Yes, sir. Mr. Vogler asked me whether I thought I was capable of going ahead with the business, and I told him I was, because I had been there from the very beginning and grown up with it, and knew all the details of it, and I told him I knew I could go ahead with the operation. And he asked me

(Testimony of Mrs. Gertrude Harmon.)

how the bank would treat me, and had been treating me, and I told him they had treated me nice and were going to continue the same arrangements with me as when Mr. Harmon was in the business.

By Mr. HALVERSTADT.—(Q.) Mrs. Harmon, I call your attention to a number of letters which are marked Plaintiff's [299] Exhibit "14," which were offered some time ago. I ask you whether those are letters which were received by the Harmon Motor Car Company?

Mr. IVEY.—That is the same bunch we had this morning?

Mr. HALVERSTADT.—Yes.

A. Those are letters from the Harmon Motor Car Company to the Northwest Auto Company.

Q. During the preceding year how had bills of lading been taken care of, drafts which came in with bills of lading?

A. The Northern Bank & Trust Company, same as we take care of them ourselves.

Q. Was that arrangement in force in 1915?

A. That arrangement was in force in 1915. The Northern Bank & Trust Company lifted a carload of cars for me on the 19th of February, after Mr. Harmon was out of the business, and about two days before Mr. Vogler cancelled the contract.

Q. And whose draft was on that carload; who drew that draft? A. Northwest Auto Company.

Q. The defendant in this case? A. Yes.

Mr. HALVERSTADT.—Now, I reoffer these letters showing that the Northwest Auto Company here



(Testimony of Mrs. Gertrude Harmon.)

has on a number of occasions stated that they would draw through the Northern Bank & Trust Company as arranged. Now, it certainly is competent testimony to prove that prior arrangement and show the course of dealing.

The COURT.—Hasn't the witness already testified that?

Mr. HALVERSTADT.—It is cumulative testimony; it is testimony the defendant can't dispute. They are their own letters. [300]

The COURT.—The objection is sustained.

Mr. HALVERSTADT.—Exception.

The COURT.—The witness having already testified to those facts.

By Mr. HALVERSTADT.—(Q.) Mrs. Harmon, calling your attention to this telegram of February 24, 1915, which reads as follows: "Seattle, Wash., 24th. Mr. Fred Vogler, Care of Northwest Auto Company, Portland, Oregon. Am making arrangements with man of considerable means to go into partnership with me and put new money in the firm. Will change firm name and reorganize and carry on the business in a way that can't help but satisfy you. Do not make definite arrangements with anyone else until you hear my proposition. Can you come to Seattle? Also answer. Gertrude Harmon,"—a telegram which is admitted in evidence as Defendant's Exhibit "A." State to the jury how you came to send that telegram?

A. Well, when I got the letter cancelling my contract I went through my brain to think of every rea-

(Testimony of Mrs. Gertrude Harmon.)

son on earth to think why Mr. Vogler would cancel my contract, whether they seemed reasonable to me or not; and I wrote him a telegram, too, immediately to keep him from signing up anybody else until I could see him again.

Q. Now, how did you come to mention that change of name?

A. Mr. Vogler had spoken about a change of name. He never put it up to me as an ultimatum, but I wanted him to know that if he wanted me to do it I would do it.

Q. How did you come to mention putting new money in the business?

A. Because there wasn't anything else on earth that Mr. Vogler could think of. I had sold all the cars that I [301] had had delivered to me; there was nothing else I could think of. I thought of everything on earth I could think of to put into that telegram to stay Mr. Vogler from signing up a contract with anyone else and assigning my agency.

Q. Did you have before you at the time you sent that telegram this letter of February 22d cancelling the contract?     A. Yes, I did.

Q. Mrs. Harmon, have you and Mr. Harmon had any business dealings of any kind since he severed his connection with the company in the early part of February, 1915?

A. I have been working as a stenographer—

Q. Answer the question.

A. I have had no business relations, or any other kind of relations, with Mr. Harmon since that time.

(Testimony of Mrs. Gertrude Harmon.)

Q. Have you been living together?

A. No, sir, I have not.

Mr. HALVERSTADT.—That is all.

Cross-examination.

(By Mr. IVEY.)

Q. Mrs. Harmon, at the time that instrument bearing date February 5, 1915, signed by Mr. Harmon, called Plaintiff's Exhibit "1," at the time that was executed and delivered to you did you pay Mr. Harmon anything for it?

A. For what, the contract? Is that what you have?

Q. This purported assignment, the one we have been calling an assignment?

A. No, I didn't pay him anything.

Q. Well, how long had you been married before February 5, 1915? [302]

A. About four years and a half.

Q. How much money did you have at the time you got married? A. About twenty thousand dollars.

Q. What became of it?

A. All went into the business.

Q. And lost in the business, too, wasn't it?

A. Yes.

Q. It was lost between the years—during that four years you lost that twenty thousand dollars?

A. Partly through my Interstate contract, and partly through the Lozier. And then on top of that, the time I had a chance to get it back, why, I had that chance taken away from me, too.

Q. Now, you admit, Mrs. Harmon, that when Mr.

(Testimony of Mrs. Gertrude Harmon.)

Vogler was talking to you about your continuing the business that he did insist that before he would consent to that that you would have to get some one to finance you, do you not?

A. No, sir, I do not admit that. Mr. Vogler didn't put any ultimatum of that kind up to me, Mr. Ivey.

Q. There was a conversation about that, was there not?

A. The only conversation Mr. Vogler had with me about money was to ask me how the bank was going to handle the matter.

Q. Will you swear positively that he didn't tell you that unless you could make arrangements for some one to finance you or put some money into the business that he could not consent for you to undertake to run the business?

A. I can swear positively that Mr. Vogler did not say that to me.

Q. Well, what was your explanation for your having put in your telegram of the 24th that you were making arrangements [303] with man of considerable means to go into partnership with you and put new money in the firm? Why did you want him to know you were going to put new money in the firm?

A. When I got the letter of cancellation I got after Mr. Harmon, he was in Bellingham—

Q. You can't testify to what you told him.

A. You asked me why I put that in the telegram.

Q. Yes, but you can't repeat a conversation you had with Mr. Harmon.

(Testimony of Mrs. Gertrude Harmon.)

A. Well, how can I tell you how I came to put that in the telegram?

Q. If that is your reason you didn't have any reason so far as the case is concerned. But you did send this telegram, there is no question about that?

A. Yes, sir, I sent the telegram.

Q. I don't remember whether I asked you the other day, there was something said by Mr. Halverstadt about your having signed up papers for divorce. That was not ever carried on out, was it?

A. No, I never did obtain a divorce from Mr. Harmon.

Q. Now, you signed up those papers shortly after this trouble arose, along in the spring—

A. You mean when I signed up the divorce papers?

Q. Yes.

A. At the same time the trouble arose I signed up the divorce papers.

Q. And then subsequently abandoned the divorce?

A. Yes.

Mr. IVEY.—I think that is all. [304]

Redirect Examination.

(By Mr. HALVERSTADT.)

Q. Mrs. Harmon, Mr. Ivey brought out you had put about twenty thousand dollars in this business. Then you said it was lost. Tell the jury how it was lost, what occasioned the loss.

Mr. IVEY.—I think that is immaterial, if your Honor please. The witness, I think, probably has gone into that sufficiently. She said it was lost in the business.

(Testimony of Mrs. Gertrude Harmon.)

Mr. HALVERSTADT.—She didn't answer how it was lost. I have a right to show what caused that money to be lost.

The COURT.—Proceed.

By Mr. HALVERSTADT.—(Q.) How was that money lost?

The COURT.—How it was lost, and how much was lost in the business, if any.

Mr. HALVERSTADT.—All right; how much of it was lost in the business?

A. The Interstate factory failure I think would have lost us about fifteen thousand dollars at least.

Q. And how much did the failure of the Lozier factory lose you?

A. Well, the Lozier factory—I don't know exactly. I wouldn't be positive what the Lozier failure did lose us, but it lost us up into thousands of dollars; maybe three or four thousand.

Q. Maybe how much?

A. Maybe three or four thousand dollars; but I wouldn't be positive.

Q. And despite that loss you had built this business up?

A. Yes, we had. We had seven months prior to the cancellation [305] of my contract—

Mr. IVEY.—Object to that, your Honor please, as calling for a conclusion.

Mr. HALVERSTADT.—All right; withdraw that.

Q. Now, Mrs. Harmon, what months of this contract are profitable and what are unprofitable months in the automobile business?

(Testimony of Mrs. Gertrude Harmon.)

Mr. IVEY.—I think that was gone over fully in the case in chief.

The COURT.—Sustained. That is not a matter of rebuttal, I don't think. It is already covered.

Mr. HALVERSTADT.—That's all.

Mr. IVEY.—That's all, Mrs. Harmon.

(Witness excused.)

Mr. HALVERSTADT.—There is just one thing else I would like to introduce. Mr. Clark, take the stand again, if you will.

**Testimony of W. H. Clark, for Plaintiff (Recalled in Rebuttal).**

W. H. CLARK, a witness for the defendant, recalled in rebuttal on behalf of the plaintiff, further testified as follows:

Direct Examination.

(By Mr. HALVERSTADT.)

Q. Calling your attention, Mr. Clark, to an instrument which is marked Plaintiff's Exhibit "15," I will ask you whose signature that is?

A. That is my signature.

Q. That is your signature? A. Yes. [306]

Q. And the note you refer to in there is the one which is mentioned in the typewriting attached to the contract, is it not? A. Yes.

Mr. HALVERSTADT.—Offer the letter in evidence.

Mr. IVEY.—No objection to that.

The COURT.—Admitted.

Letter referred to received in evidence, marked

(Testimony of W. H. Clark.)

Plaintiff's Exhibit "15" and made a part of the record herein.

Mr. HALVERSTADT.—That is all.

Mr. IVEY.—No cross-examination.

(Witness excused.)

Mr. HALVERSTADT.—Plaintiff rests.

Mr. IVEY.—If your Honor please, no progress has been made in that matter. I would like to be permitted to speak with Mr. Vogler about it for a minute and it may be we will rest.

(Mr. Ivey, Mr. Clark and Mr. Vogler confer.)

Mr. IVEY.—If your Honor please, the defendant rests.

ARGUMENT TO THE JURY BY RESPECTIVE COUNSEL.

COURT ADJOURNED UNTIL 2 P. M. [307]

### **Instructions of the Court.**

Gentlemen of the jury: You have listened to all of the testimony which has been presented in this case on the part of the plaintiff and on the part of the defendant. It is for you to determine what the facts in the case are bearing upon the issues as presented.

The issue in this case is made by the complaint of the plaintiff, who charges that on the 17th day of October, 1914, the Harmon Motor Car Company entered into a contract with the defendant whereby the defendant agreed to furnish to the Harmon Motor Car Company certain automobiles during a specified period of time; and that the defendant failed to do that and cancelled the contract prior to its termina-



tion by its terms, and the plaintiff, the Harmon Motor Car Company, was damaged by that. Then sets out the fact she succeeded to the interests of the Harmon Motor Car Company and has a right, by reason of that, to prosecute this action.

The defendant Motor Car Company admits that the contract was entered into. It likewise admits that it was a corporation, as charged in the complaint. It denies practically all of the other allegations of the complaint; denies that motor cars had been sold; denies that the plaintiff was damaged, or the Harmon Motor Car Company was damaged; and denies likewise that the Harmon Motor Car Company was damaged in any sum whatever on account of any conduct on the part of the defendant. [308]

And it further sets up as an affirmative defense the fact that it entered into a contract, and that by reason of the terms of the contract it was entitled to reapportion the territory during any time of the period of the contract that it saw fit that had been given to the Harmon Motor Car Company, and that it did, in the month of January, 1915, because of certain conduct, which is set out here, on the part of the President of the Harmon Motor Car Company, deemed it wise to cancel the contract, and did, pursuant to the authority given under the terms of the provisions to which I have referred, terminated the contract.

And it further alleges as a further affirmative defense that there was a condition attached to the contract which was entered into which required \$—— to be paid in thirty days, and unless that was promptly paid on the date it was due that the con-

tract would be ended, in default. And that the note was not paid within thirty days, or at all, and that on the 27th of February, a considerable part being *lost* past due, it did serve on the Harmon Motor Car Company the notice required and terminated the contract after the expiration of ten days, and entered into a new contract with another concern in the City of Seattle for the sale and distribution of the car.

The plaintiff files a reply to the affirmative matter and denies all of the allegations set up in the affirmative matter of the answer.

It is for you to determine in this case what the facts in the case are. You will determine that from [309] all of the evidence which has been offered and admitted.

You, gentlemen of the jury, are the sole judges of the facts in the case, and you must determine what the facts in the case are. It is not my purpose to express any opinion I may have of a single fact in the case, and if I should do so you should disregard it. It is the purpose of the law that jurors shall determine the facts in trials of this character. From your finding upon the fact there is no appeal—your conclusion is final. You will therefore be impressed with the responsibility that rests upon you, and it will occasion you to move in the manner impressed with this responsibility in coming to a conclusion. And in determining the weight of the evidence you necessarily must consider the feelings which you ought to give to the testimony of the several witnesses.

You are, therefore, the sole judges of the credibil-

ity of the witnesses who have testified before you, and you will, in determining the credit to be attached to the testimony of any witness, take into consideration the demeanor of the witness upon the witness-stand, the opportunities of the witness for knowing the things about which they testified, the reasonableness of the story of the witnesses who testified, the interest or lack of interest in the result of this controversy; in fact, you will consider any matter which has been developed on the trial of the cause by the evidence which has been presented which could in any way emphasize the credit that should be given or could in any way lessen the degree of confidence which should be placed upon that [310] testimony.

And in this connection you are advised if any witness has wilfully testified falsely in your judgment concerning any material fact in the cause you would have a right to disregard that testimony entirely except in so far as it may be corroborated by the other credible evidence that may be developed in the trial of the case.

In your consideration of this case you will take into consideration all of the matters which have been developed upon the trial and determine what the truth in this case really is.

You are instructed that in this case the status of the parties with reference to the benefits to accrue to any of the parties between the contract is the understanding of the parties at the time, the terms of the contract that was entered into, and it is from this basis that their rights must be determined.

By the provisions of this contract the defendant

had a right to reapportion the territory covered by this contract for reasons sufficient under the particular provision. The defendant could not simply move arbitrarily and simply take from the plaintiff the benefit which had already accrued and earned without compensating the plaintiff for such earnings already made and practically terminated. In other words, the defendant could not, under the terms of this contract, cancel the contract after the plaintiff had sold a number of automobiles and had earned moneys by reason of the provisions of the terms of this contract without compensating the plaintiff for the earnings already made. In other words, if you find from the [311] evidence in this case that the plaintiff, the Harmon Motor Car Company, had sold a number of automobiles at the time of the cancellation of this contract, and that the defendant then did cancel the contract by any sort of method adopted, as disclosed by the evidence, that the plaintiff would not be precluded from recovering for the damage which was sustained by the Harmon Motor Car Company by reason of the sales which had been made prior to that time.

You are also instructed that the plaintiff would be entitled to recover for such sales that could have been made during the life of the contract if the cars had been furnished, if you find from the evidence that it was reasonably certain that sales could have been made and profits could have been earned, but such profits from such sales must appear from the testimony to have been reasonably certain and not resting chiefly on speculation, conjecture or surmise. It is

not necessary that this damage, if any, sustained by reason of sales not already made, or, rather, prospective sales, be fixed by the testimony with mathematical accuracy; but it must be established to such a degree of certainty as to lead the jury to a reasonable approximation of what that would be, eliminating the element of speculation, conjecture and surmise entirely from that consideration.

Now, in order to determine whether the Harmon Motor Car Company would have been able to sell cars which it had contracted to buy from the defendant, and which had not been sold by the Harmon Motor Car Company or by the plaintiff at the time of the breach of the contract, you will take into consideration all the evidence which [312] has been presented bearing upon the condition of the market for cars, the ability of the Motor Car Company, or the plaintiff, under the testimony, to meet the public demand, the preparation which had been made for the sale by cultivating the mind, the public mind, by advertising, by the equipment of its place of business, garage, and all of the elements disclosed by the testimony which goes to make up the immediate environment, and surrounding which discloses a relation to the public, and determine from all the evidence what that relation was, and what the evidence shows would have been reasonably certain to have been developed from that condition; and likewise take into consideration the character of the car, the reliability and efficiency of the machine, and all of the matters disclosed by the evidence which, as I have stated a moment ago, would carry you to that

reasonable conclusion of certainty as to what, if any, loss was sustained by reason of such fact.

You are further instructed that the fact that this note attached to this contract provides that if not paid within a given time that the contract shall end, that under the testimony disclosed in this case that provision of the note is waived. When the defendant gave to the Harmon Motor Car Company time in which to pay the note, and carried the note from time to time, and accepted payments upon the note, it thereby waived the arbitrary clause in the contract giving it the power to cancel it *any* any time; and before the defendant could cancel the contract after it had carried it along in the way disclosed by the testimony, and accepted payments as disclosed [313] by the testimony, the Harmon Motor Car Company, or the plaintiff in this case as the successor in interest of the Harmon Motor Car Company, would have been entitled to a reasonable notice and demand for the payment, and afforded an opportunity of meeting the terms before being cut off in an arbitrary way.

You are also instructed that a *part*, on terminating a relation existing between him and another upon a given ground and for a stated reason, may not, after the termination of that relation and suit has been instituted in the court to recover because of a wrongful termination of that relation, change his reason for terminating that relation. In other words, the defendant in this case could not terminate the contract in February for a stated reason and now give another reason upon the trial of the cause for the cancella-

tion of the contract. It is bound by the reason given in the letter at the time the contract was attempted to be cancelled, which is in evidence before you, and any other reason which may appear in the evidence may not be of force.

You are instructed that under the provisions of the contract in suit the defendant was and is excused for delays in delivery due to strikes, floods, or any other causes beyond the control of the manufacturer, or seller, whether occurring in the plant of the manufacturer, or that of any concern from which the manufacturer or seller purchased parts or equipment; and the shipment of the automobiles covered by the contract in suit was made, as specified in the contract, subject to the prior orders of other dealers, and as the business of the manufacturer [314] would permit.

In this case you will determine from the evidence the number of automobiles contracted prior to the contract entered into between the plaintiff, or her assignor, and the defendant on the 18th of October, 1914,—and all this is in evidence—and then determine whether the failure of the defendant to furnish the cars was due to prior orders, and if you find that the prior orders were less than the cars subsequently furnished by the defendant, then, of course, the failure of the factory could not obtain and that would not have force in this litigation.

You are further instructed that upon the cancellation of the contract by the defendant Motor Car Company it was the duty of the plaintiff to minimize her damage insofar as it may be done; that is, by

getting some other car to take the place of the car that she had contracted for with the defendant, so that if she could sell another car to supply the orders which she had received that the damage might be lessened; and if the testimony before you shows that if the plaintiff did make no attempt to secure any other car to take the place of the other car, if you find from the evidence that that would have been useless and it could not have been done—and I think the only testimony in this case is that of the plaintiff herself, who testified before you—why, then that contention of the defendant could not operate in your consideration in this case.

You will give this case careful consideration. You will not permit yourself to be influenced by any sympathy or prejudice in any way, and will not find for [315] the plaintiff because you may think that she was unfortunate in some investments, or against the defendant because you feel that the defendant might be able to pay; but you will pass upon the issues here fairly and frankly, and with a conscientious view of doing justice between these parties, as you would wish done by you, and deliberate upon this in a conscientious, fair and frank manner as you would want persons to deliberate upon a like concern of your own if your positions were reversed, and so that you then would feel as jurors that justice has been done and you have duly deliberated upon your conclusion in this case.

It will require your entire number to agree upon a verdict, and when you have agreed upon a verdict you will cause it to be signed by your foreman, whom



you will elect immediately upon retiring to your jury-room.

If you find for the defendant you will simply sign that verdict. If you find for the plaintiff you will insert the number of dollars that you find for the plaintiff in this case in the blank which is left here, which in no event can be more than the amount stated in the complaint.

The complaint, answer and reply will be sent to the jury-room with you, but they are not to be considered as evidence in the cause. They simply recite the claims of the several parties, and you will conclude that relation to the facts solely from the evidence which has been offered and admitted.

Are there any exceptions you wish?

Mr. IVEY.—Yes, your Honor please, I agreed with Mr. Halverstadt. [316] I would dictate those exceptions after the jury are out.

The COURT.—A certain Court of Appeals have declined to entertain an appeal unless the exceptions are taken in the presence of the jury.

Mr. IVEY.—I should like to take my exceptions at this time, and I am sure Mr. Halverstadt would, too. The defendant excepts to your Honor's failure to give the proposed instruction No. 1; also to proposed instruction No. 2, No. 3, No. 4, No. 5, 6 and 7. I think your Honor gave the instruction No. 8.

The COURT.—In substance, yes.

Mr. IVEY.—And I think your Honor gave some instructions that cover the part of these instructions that I am now taking exception to. It would be very difficult for me to figure out at this time what spe-

cific parts they were, or to tell just exactly to what extent they lapped over, but I would reserve those exceptions. Those exceptions that I took to your Honor's refusal to give these instructions are based upon the fact that, in my opinion, these instructions are applicable to this case.

The COURT.—Yes. Note the exception.

Mr. IVEY.—And the instruction that your Honor gave, being No. 7, we except to for the reason that it is not a correct statement of the law.

The COURT.—I am afraid you will have to recite it. There is no number by which these can be gotten in the record.

Mr. IVEY.—But that was the substance, the plaintiff's purpose, No. 7, your Honor. Your Honor gave the substance of quite a number of instructions prepared, but it was that instruction with reference to—  
[317]

The COURT.—The installments of payments?

Mr. IVEY.—Yes, sir. Then the instruction that was numbered 5 of plaintiff's proposed instructions, in which your Honor instructed the jury that when a party gives a reason for his conduct, and so forth, that he couldn't subsequently change the reason. I except to that one for the reason that it has no application in this case, even conceding that it was the law, and also upon the ground that that does not correctly state the law.

The COURT.—I will state there was some question in my mind whether it did have application for the reason that I struck from the jurors' consideration, I think, most of the testimony that bears upon

this instruction; that is, the testimony which went to the fact of the inability to furnish the cars. An exception may be noted.

Mr. IVEY.—Your Honor please, while I think of it, at this time, in your Honor's stating to the jury what the issues were here, your Honor inadvertently overlooked to state that the answer was amended with reference to those cars that we were unable to deliver.

The COURT.—That was simply on the admission of the evidence, and the evidence has gone in anyhow. I think that would be confusing to the jury.

Mr. IVEY.—I think so myself. We except to the plaintiff's No. 1 on the ground that it is not a correct statement of the law.

The COURT.—I didn't give either of those instructions.

Mr. IVEY.—It is very difficult for me, your Honor, to determine just what parts of those instructions were given by your Honor, because now and then I could see [318] where your Honor was on that subject referred to in that instruction, but then would change it. I withdraw that, then, and note an exception to the one which your Honor gave, which was, in substance, that part of one which your Honor did give in reference to that assignment. I understand that your Honor did not give plaintiff's No. 2. I didn't recall it.

The COURT.—Not as requested. I may have given some of the substance of that. I don't recall.

Mr. IVEY.—Well, I would like an exception to that. I recall now what your Honor did say about

that. I would like an exception to the instruction that your Honor did give with reference to the right of the Harmon Motor Car Company to have the cars delivered to it that it had already sold, notwithstanding the fact that the defendant had a right to cancel the contract. There can be no question as to which one that was. And your Honor gave also the substance of No. 3, the substance of that part thereof which begins with about the middle of line number six, to which we wish to reserve an exception. That is all the exceptions I have this time, your Honor.

The plaintiff took no exceptions.

The defendant's proposed instructions that were duly presented and above referred to as numbered one to seven inclusive are respectively as follows:

DEFENDANT'S PROPOSED INSTRUCTION  
NO. 1.

You are instructed that the defendant company had a right under the terms of the contract in question to cancel and rescind the contract that it had with the Harmon [319] Motor Car Company, if the defendant F. E. Harmon conducted the business of the company in such manner as to bring the Reo machine into disrepute and if you find from the evidence in this case that the said conduct was such as to bring about this disrepute, then your verdict must be for the defendant.

DEFENDANT'S PROPOSED INSTRUCTION  
NO. 2.

You are instructed further that if you find that the Harmon Motor Car Company at any time between the first of October, 1914, and the 22d day of

February, 1915, through F. E. Harmon, the husband of plaintiff in this case, was neglecting the business of selling Reo machines and that the said F. E. Harmon was conducting himself and the business of said agency so as to bring the Reo car into disrepute in the city of Seattle and the territory covered by said contract, the defendant had a right to cancel and rescind said contract, and your verdict must be for the defendant.

DEFENDANT'S PROPOSED INSTRUCTION  
NO. 3.

You are instructed further that the contract in question is one of a personal nature and that the same could not be assigned by the Harmon Motor Car Company without the consent and approval of the Northwest Motor Car Company and that any attempted assignment on the part of the Harmon Motor Car Company without this consent is void and of no effect.

DEFENDANT'S PROPOSED INSTRUCTION  
NO. 4.

You are further instructed that if the said Harmon Motor Car Company, up to the time that said contract was [320] cancelled by the defendant company, was not properly promoting the sale of said Reo car in the territory allotted to it by the contract, the said defendant Company had a right to cancel the said contract, and if you find from the evidence that the Harmon Motor Car Company during this period was not in fact properly promoting the sale of these cars in all or any part of the territory

allotted to it, then your verdict must be for the defendant.

DEFENDANT'S PROPOSED INSTRUCTION  
NO. 5.

You are further instructed that the defendant had a right to cancel said contract for the failure of the Harmon Motor Car Company to pay that certain note described in said contract toward the end thereof, which said note was payable by the terms of said contract within thirty days from and after October 17th, 1914, and if you find that the said Harmon Motor Car Company neither paid the said note within said period of thirty days, nor within such additional time as was given to it by the defendant Company within which to pay the same, that said contract was subject to cancellation at the option of the defendant company, and your verdict must be for the defendant.

DEFENDANT'S PROPOSED INSTRUCTION  
NO. 6.

You are further instructed that if you find that the defendant was not justified in cancelling the contract it had with the Harmon Motor Car Company, you are then to determine what damages, if any, the Harmon Motor Car Company suffered by reason of this cancellation and in determining these damages you must include only such damages as could have been reasonably contemplated by the defendant company when it terminated said contract, and [321] you are instructed that the contract in question provides that the Harmon Motor Car Com-

pany should report at the end of each week to the seller all names and addresses of parties purchasing cars from the Harmon Motor Car Company during that week, together with the factory number of the car or cars sold, and that if any damages were sustained by the reason of such nondelivery of any such cars that were not thus reported prior to the date of cancellation of such contract, that such item of damage shall not be allowed; and in determining the damage that the said Harmon Motor Car Company sustained you will have to consider not the gross profits that would have been made on the sale of the machines that the plaintiff claims were not delivered to this company, but only the net profits that would have been made.

DEFENDANT'S PROPOSED INSTRUCTION  
NO. 7.

You are further instructed that the contract between the defendant and the Harmon Motor Car Company provides, among other things, that it was contingent delays due to strikes and other matters and that the shipment of the automobiles which the defendant was to furnish to the said Harmon Motor Car Company was subject to the prior orders of other dealers and was to be made as the business of the manufacturer would permit; and if you find that the plaintiff was entitled to damages against the defendant, you are to use as a basis of the number of machines that should have been furnished that number which you find could have been furnished by the defendant under said contract, having due regard

for the said provisions, and you are instructed that the said defendant by said contract [322] did not agree to cause the manufacturer to do anything in particular, but it agreed to furnish the Harmon Motor Car Company the number of machines referred to in said contract subject to the conditions, among others, just mentioned.

The plaintiff's proposed instructions numbered two, three, five and seven, above referred to, are respectively as follows:

II.

You are instructed that even though you may find that the defendant rightfully cancelled the contract between it and the Harmon Motor Car Company, it could not refuse to deliver the automobiles which had theretofore been sold by the Harmon Motor Car Company, if you find that any such automobiles were so sold by it, and you are further instructed that the defendant at the time of such cancellation would owe to the plaintiff the commissions fixed by the contract for the automobiles which had been sold by the Harmon Motor Car Company prior to such cancellation.

III.

The profits which the plaintiff would have made in selling the cars which the defendant had agreed to sell, but which had not been sold by the plaintiff or the Harmon Motor Car Company at the time the defendant breached the contract, if you find that the defendant did breach the contract, are what is known in law as "prospective profits." The loss of such profits may be recovered when it appears to have been within the contemplation of the parties as a



probable result of the breach of the contract, to be its natural, primary and probable [323] consequence, and to be susceptible of proof by evidence reasonably certain, and not resting chiefly on speculation, conjecture or surmise. It is not necessary that the damages in order to be recoverable shall be calculable with mathematical accuracy. There may be elements which can be determined only by approximation, and which may be in some degree contingent or matter of opinion; and yet the damages as a whole may be measured by standard as definite as that by which in the nature of things juries must be guided in reaching results in many instances.

## V.

When a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his grounds, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by settled principles of law.

## VII.

I charge you, as a matter of law, that if you find the Northwest Auto Company permitted the Harmon Motor Car Company to pay the note mentioned in the contract, a copy of which is attached to the complaint in this case, in installments, and granted it indulgences as to matter of time in the way of payment of that note, it waived payment thereof according to its terms, and could not thereafter declare the contract forfeited without having first

notified the Harmon Motor Car Company of its intention so to do and have given it a reasonable time to pay the note.

And you are further instructed that if no forfeiture [324] of the contract was declared for non-payment of the note prior to the payment thereof, the Northwest Auto Company could not thereafter forfeit the contract because the note was not paid at the time it became due.

**JURY RETIRES TO CONSIDER THEIR VERDICT.**

Thereafter a motion for a new trial was duly filed upon the grounds, among other things, that the verdict was excessive and that the evidence was not sufficient to justify the same and that there occurred errors at the time of trial, which errors were specifically set out in the motion, and the same came on for hearing and was denied and exception allowed, and thereafter a judgment in the following form was entered:

*“United States District Court, Western District of  
Washington, Northern Division.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Judgment.**

This cause came on for trial before the court and a jury on the 21st day of June, 1917, the plaintiff

appearing in person and by Piles & Halverstadt, and Miller & Lysons, her attorneys, the defendant appearing by its officers and by Kerr & McCord, and J. M. Ivey, its [325] attorneys, and testimony in evidence on behalf of the parties having been offered and received by the Court, and said cause having been submitted to the jury under instructions of the Court, and said jury having returned a verdict in favor of the plaintiff in the sum of \$13,727.10, and the plaintiff having duly remitted from said verdict the sum of \$983.95, and the Court being fully advised in the premises,—

IT IS ORDERED, ADJUDGED AND DECREED, that the plaintiff G. M. Harmon, do have and recover from the Northwest Auto Company, a corporation, defendant above named, the sum of \$12,743.15, together with her costs and disbursements herein taxed at the sum of \$——, with interest thereon at the rate of 6% per annum until paid, to which the defendant excepts and exceptions allowed.

Done in open court this —— day of August, 1917.

JEREMIAH NETERER,

Judge.”

To the entering of which judgment the defendant excepted and exception was allowed. [326]

Thereupon, in furtherance of justice and that right may be done, the defendant presents the foregoing as its bill of exceptions, and prays that the same may be settled, allowed, signed and certified by the Judge who tried the cause as provided by law.

KERR & McCORD,

Attorneys for Defendant.

[Indorsed]: Filed in the U. S. District Court, Western District of Washington, Northern Division. Sep. 28, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [327]

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*In the District Court of the United States for the  
Western District of Washington, Northern Di-  
vision.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Petition for Writ of Error.**

To the Honorable JEREMIAH NETERER, Judge of  
the District Court aforesaid:

Now comes the Northwest Auto Company, defend-  
ant in the above-entitled cause by attorney, and re-  
spectfully shows that on the 26th day of June, 1917,  
a jury, duly impaneled, found a verdict against your  
petitioner, the Northwest Auto Company.

Your petitioner feeling itself aggrieved at said  
verdict and judgment rendered thereon as aforesaid,  
herewith petitions the Court for an order allowing it  
to prosecute a writ of error to the United States  
Circuit Court of Appeals, for the Ninth Circuit, un-  
der the laws of the United States in such cases made  
and provided.

Wherefore, premises considered, your petitioner

prays that a writ of error do issue with an appeal in this behalf to the United States Circuit Court of Appeals, aforesaid, sitting at San Francisco, State of California, in said Circuit for the correction of the error complained of, and herewith assigned, be allowed, and that an order be made fixing the amount of security to be given by the plaintiff in error conditioned as the law directs, and upon giving such bond as may be required, that all further proceedings may be suspended until the determination of the said Writ of Error [328] by the Circuit Court of Appeals for the Ninth Circuit.

KERR & McCORD,

Attorneys for Petitioner in Error.

Copy of within petition for writ of error received and due service of same acknowledged this 10th day of Oct., 1917.

PILES & HALVERSTADT,

Attorneys for Plaintiff.

[Indorsed]: Petition for Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Oct. 10, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [329]

*In the District Court of the United States for the  
Western District of Washington, Northern Di-  
vision.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY,

Defendant.

### **Assignment of Errors.**

Comes now the defendant Northwest Auto Company, a corporation, and files the following assignment of errors upon which it will rely on the prosecution of its writ of error in the above-entitled cause:

#### I.

The Court erred in permitting the witness Thornton to answer the following question:

Q. Mr. Thornton, if deliveries had been made of cars as specified in this contract, Plaintiff's Exhibit 3, as follows: October, 2; November, 1; December, 4; January, 8; February, 20; March, 20; April, 20; May, 15; and June, 10; if, I say, deliveries of cars had been made according to that schedule, how many cars could the Harmon Motor Car Company have disposed of before the expiration of this contract on the 31st day of July, 1915?

The defendant objected to this question upon the ground that it called for a conclusion and the objec-

tion was overruled and defendant took exception.  
[330]

II.

The Court erred in refusing to sustain defendant's objection to permitting the witness F. E. Harmon to answer the following question:

Q. Mr. Harmon, what, if anything, in addition to what you testified yesterday \* \* \* what condition, if any, in addition to what you suggested yesterday afternoon created a demand and a special demand for autos in the city of Seattle in the year, later part of the year, 1914 and 15?

The defendant objected to this question being answered upon the ground of its being immaterial, and the objection being overruled exceptions were taken.

III.

The Court erred in overruling the said witness' answer to the question set out in assignment six, which answer was as follows:

A. Well along with the other things I named yesterday, one thing in particular was the coming of jitney busses; that is the thing that brought out several hundred, a good hundred sales in the city of Seattle *along*, and the Reo car was a practical car for that because of its feature of being cheap in operation and such things as that and there were a good many Reos and such cars as that sold.

The defendant moved to strike this answer out

upon the ground that it was immaterial and the motion was denied and exception taken.

## IV.

The Court erred in refusing to grant the defendant's motion for nonsuit. To which ruling the defendant took exception and exception was allowed. [331]

## V.

The Court erred in refusing to permit the witness Vogler to answer the following question, when he was being examined as to what was the outcome of his going to a certain bank to make inquiries as to the financial standing of the Harmon Motor Car Company:

Q. What was the result?

To this ruling defendant duly objected and excepted.

## VI.

The Court erred in refusing to permit the witness Albert Burke to answer the following question:

Q. Well, what representations, if any, were made to you with reference to this being a new car?

The answer to this question would have been that the Harmon Motor Car Company had sold to this witness a second-hand car representing that it was a new car. Objection to the answer having been sustained, the defendant excepted.

## VII.

The Court erred in striking the answer to the following question propounded to the witness Burke:

Q. Why would you not have kept your contract with them?



The plaintiff moved to strike this question because she contended that the contract did not provide for cancellation on such a contingency, the answer having been:

A. Because the business relations weren't pleasant.

To this ruling defendant excepted.

VIII.

The Court erred in refusing to permit the witness Burke to answer the following question:

Q. Well, what were the facts that caused you to cancel [332] this contract in addition to not having furnished you the cars?

IX.

The Court erred in refusing to permit the witness Burke to continue his answer to the following question:

Q. Now, if I may, go on and state any further instances \* \* \* .

Mr. HALVERSTADT.—We object to a general discourse to this answer.

The COURT.—Yes, I must sustain the objection, because we are not trying out the issues between the Harmon Motor Car Company and this witness; that's a new issue entirely; that is not before the Court.

Mr. IVEY.—I would like to except, your Honor.

The COURT.—Noted.

It being the contention of the defendant that this evidence was material.

## X.

The Court erred in granting plaintiff's motion to strike out the testimony of the witness Clark as to the conditions existing which prevented the defendant from getting sufficient cars to fill its contracts, which said testimony is set out at page — of defendant's proposed bill of exceptions; such testimony having been claimed by plaintiff to be self-serving and hearsay evidence. To this ruling the defendant excepted and exception allowed.

## XI.

The Court erred in refusing to permit the defendant to prove that the contract that was had by said witness Burke and the Harmon Motor Car Company was cancelled by the said witness for a good and sufficient reason, which ruling this defendant excepted.  
[333]

## XII.

The Court erred in refusing to give defendant's proposed instruction No. 1 as follows:

You are instructed that the defendant Company had a right under the terms of the contract in question to cancel and rescind the contract that it had with the Harmon Motor Car Company, if the defendant F. E. Harmon conducted the business of the Company in such manner as to bring the Reo machine into disrepute and if you find from the evidence in this case that the said conduct was such as to bring about this disrepute then your verdict must be for the defendant.

To which defendant duly excepted and exception allowed.

XIII.

The Court erred in refusing to give defendant's proposed instruction No. 2, as follows:

You are instructed further that if you find that the Harmon Motor Car Company at any time between the first of October, 1914, and the 22d day of February, 1915, through F. E. Harmon, the husband of plaintiff in this case, was neglecting the business of selling Reo machines and that the said F. E. Harmon was conducting himself and the business of said agency so as to bring the Reo car into disrepute in the City of Seattle and the territory covered by said contract, the defendant had a right to cancel and rescind said contract, and your verdict must be for the defendant.

To which defendant duly excepted and exception was allowed.

XIV.

The Court erred in refusing to give defendant's proposed instruction No. 3 as follows:

You are instructed further that the contract in question is one of a personal nature and that the same could not be assigned by the Harmon Motor Car Company without the consent and approval of the Northwest Auto Company and that any attempted assignment on the part of the Harmon Motor Car Company without this consent is void and of no effect.

To which defendant duly excepted and exception was allowed.

#### XV.

The Court erred in refusing to give defendant's proposed Instruction No. 4, as follows: [334]

You are further instructed that if the said Harmon Motor Car Company, up to the time that said contract was cancelled by the defendant Company, was not properly promoting the sale of said Reo cars in the territory allotted to it by the contract, the said defendant Company had a right to cancel the said contract, and if you find from the evidence that the Harmon Motor Car Company during this period was not in fact properly promoting the sale of these cars in all or any part of the territory allotted to it, then your verdict must be for the defendant.

To which defendant duly excepted and exception allowed.

#### XVI.

The Court erred in refusing to give defendant's proposed instruction No. 5, as follows:

You are further instructed that the defendant had a right to cancel said contract for the failure of the Harmon Motor Car Company to pay that certain note described in said contract toward the end thereof, which said note was payable by the terms of said contract within thirty days from and after October 17th, 1914, and if you find that the said Harmon Motor Car Company neither paid the said note within the said period of thirty days, nor within such addi-

tional time as was given to it by the defendant Company within which to pay the same, that said contract was subject to cancellation at the option of the defendant company, and your verdict must be for the defendant.

To which defendant duly excepted and exception was allowed.

## XVII.

The Court erred in refusing to give defendant's proposed instruction No. 6, as follows:

You are further instructed that if you find that the defendant was not justified in cancelling the contract it had with the Harmon Motor Car Company, you are then to determine what damages, if any, the Harmon Motor Car Company suffered by reason of this cancellation and in determining these damages you must include only such damages as could have been reasonably contemplated by the defendant company when it terminated said contract, and you are instructed that the contract in question provides that the Harmon Motor Car Company should report at the end of each week to the seller all names and addresses of parties purchasing cars from the Harmon Motor Car Company during that week, together with the factory number of the car or cars sold, and that if any damages were sustained by the reason of such non-delivery of any such cars that were not thus reported prior to the date of cancellation of such contract, that such item of damages shall not be allowed; and in determining the damage that

the said Harmon Motor Car Company sustained you will [335] have to consider not the gross profits that would have been made on the sale of machines that the plaintiff claims were not delivered to this company, but only the net profits that would have been made.

To which the defendant duly excepted and exception was allowed.

### XVIII.

The Court erred in refusing to give defendant's proposed instruction No. 7, as follows:

You are further instructed that the contract between the defendant and the Harmon Motor Car Company provided, among other things, that it was contingent upon delays due to strikes and other matters and that the shipment of the automobiles which the defendant was to furnish to the said Motor Car Company was subject to the prior orders of other dealers and was to be made as the business of the manufacturer would permit, and if you find that the plaintiff was entitled to damages against the defendant, you are to use as a basis of the number of machines that should have been furnished, that number which you find could have been furnished by the defendant under said contract, having due regard for the said provisions, and you are instructed that the said defendant by said contract did not agree to cause the manufacturer to do anything in particular, but it agreed to furnish the Harmon Motor Car Company the number of machines referred to in said

contract subject to the conditions, among others, just mentioned.

To which the defendant duly excepted and exception was allowed.

XVIII.

The Court erred when it gave the following instruction:

The defendant could not simply move arbitrarily and simply take from the plaintiff the benefit which had already accrued and earned without compensating the plaintiff for such earning already made and practically terminated. In other words, the defendant could not under the terms of this contract cancel the contract after the plaintiff had sold a number of automobiles and had earned the money by reason of the provisions of the terms of this contract, without compensating the plaintiff for the earnings already made, etc.

To which the defendant duly excepted and exception was allowed. [336]

XIX.

The Court erred when it gave the following instruction:

You are also instructed that the plaintiff would be entitled to recover for such sales as could have been made during the life of the contract, if the cars had been furnished, *it* you find from the evidence that it was reasonably certain that the sales could have been made and the profits could have been earned, but such profits

from such sales must appear from the testimony to have been reasonably certain, etc.

To which the defendant duly excepted and exception was allowed.

### XX.

The Court erred when it gave the following instruction:

You are further instructed that the fact that this note attached to this contract provides that if the note was not paid within a given time that the contract should end, that under the testimony disclosed in this case, that provision of the note is waived \* \* \* and the Harmon Motor Car Company or the plaintiff in this case as the successor in interest of the Harmon Motor Car Company would have been entitled to reasonable notice and demand for the payment and afforded an opportunity of meeting the terms before being cut off in an arbitrary way.

To which the defendant duly excepted and exception was allowed.

### XXI.

The Court erred in instructing the jury as follows:

You are instructed on terminating a relation existing between one party and another upon a given ground and for a stated reason, one may after the termination of that relation and suit has been instituted in the court to recover because of a wrongful termination of that relation, change his reason for terminating that relation. In other words, the defendant



in this case could not terminate the contract in February for a stated reason, and now give another reason upon the trial of the cause for the cancellation of the contract. It is bound by the reason given in the letter at the time the contract was attempted to be cancelled, which is in evidence, because of any other reason, which may appear in the evidence may not be enforced.

To the giving of this instruction the defendant excepted and exception was allowed.

XXII.

The Court erred in not granting the defendant a new trial, to which defendant duly excepted and exception was allowed. [337]

XXIII.

The Court erred in making and entering the decree made and entered herein on or about the 1st day of September, 1917, because the verdict upon which the said decree was based was against the law, contrary thereto and excessive in amount, and because the jury, in arriving at their verdict, did not follow the instructions of the Court. The defendant excepted to the entering of this decree and the exception was allowed.

WHEREFORE, the said defendant, plaintiff in error, prays that the judgment in said trial court be reversed and that the said District Court of the United States for the Western District of Washington, Northern Division, be directed to grant a new trial in said cause.

KERR & McCORD,  
Attorneys for Defendant.

Due and timely service of the foregoing assignment of errors is hereby accepted on this 10th day of October, 1917.

PILES & HALVERSTADT,  
Attorneys for Plaintiff.

[Endorsed]: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Oct. 10, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [338]

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*In the District Court of the United States for the  
Western District of Washington, Northern Di-  
vision.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Order Allowing Writ of Error and Fixing Amount of  
Bond.**

The defendant having this day filed its petition for a Writ of Error from the Judgment entered herein to the United States Circuit Court of Appeals for the Ninth Circuit, together with an Assignment of Errors, all in due time, and praying that an order be made fixing the amount of security which defendant shall furnish on said Writ of Error, and that upon the giving of such security, all proceedings in this court be stayed pending the determination of said Writ of Error, it is hereby

ORDERED that a Writ of Error is hereby allowed to have judgment reviewed in the *United Circuit* Court of Appeals for the Ninth Circuit and it is further

ORDERED that upon the defendant, Northwest Auto Company, a corporation, filing with the clerk of this court a good and sufficient bond in the sum of \$16,000.00 to the effect that if the said defendant, Northwest Auto Company, a corporation, shall prosecute the said Writ of Error to effect, and answer all damages and costs, if it fails to make its plea good, then the said obligation to be void, otherwise to remain in full force and virtue. Said bond to be approved by the Court and all further proceedings in this court be and are hereby suspended and stayed until the determination of the said Writ of Error by the Honorable United States Circuit Court of Appeals for the Ninth Judicial Circuit. [339]

Dated at Seattle, Washington, this the 10th day of October, 1917.

JEREMIAH NETERER,  
Judge.

Service of the foregoing order allowing writ of error and fixing amount of supersedeas bond is hereby accepted this the 10th day of October, 1917.

PILES & HALVERSTADT,  
Attorneys for Plaintiff.

[Indorsed]: Order Allowing Writ of Error and Fixing Bond. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Oct. 10, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [340]

*In the District Court of the United States for the  
Western District of Washington, Northern Divi-  
sion.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS,  
That the Northwest Auto Company, a corporation,  
as principal, and Massachusetts Bonding and Insur-  
ance Company, a corporation, authorized to do a  
surety business in the State of Washington, Surety,  
are held and firmly bound unto G. M. Harmon, plain-  
tiff above named, in the sum of sixteen thousand and  
no/100 dollars, to be paid to said G. M. Harmon, her  
executors, administrators and assigns, for which pay-  
ment well and truly to be made we bind ourselves and  
each of us jointly and severally, and our and each  
of our heirs, executors, administrators, successors or  
assigns, firmly by these presents.

Sealed with our seals and dated this the 10th day  
of October, 1917.

WHEREAS, the defendant above named has sued  
out a writ of error to the United States Circuit Court  
of Appeals for the Ninth Circuit to reverse the judg-  
ment entered in the above-entitled court in favor of  
plaintiff and against the defendant in the sum of

twelve thousand seven hundred forty-three and 15/100 (\$12,743.15) dollars, and costs to be taxed at \$——.

NOW, THEREFORE, the condition of the above obligation is such that the above-named defendant shall prosecute said writ of error to effect and shall answer and pay all costs if it shall fail to make good its plea, then the above obligation [341] shall be void; otherwise it shall be and remain in full force, virtue and effect.

WITNESS our seals and names hereto affixed the day and year first above written.

NORTHWEST AUTO COMPANY.

By KERR & McCORD,

Its Attorneys.

MASSACHUSETTS BONDING AND INSURANCE CO.

[Seal]

By FRANK E. SMITH,

Attorney in Fact.

COUNTERSIGNED at Vancouver, Washington,

By J. R. McGILL,

Resident Agent.

The above and foregoing bond, and the sufficiency of the surety thereon, is hereby approved by me this 10th day of October, 1917.

JEREMIAH NETERER,

Judge of the District Court of the United States for the Western District of Washington.

Copy of within bond received and due service of same acknowledged this 10th day of Oct., 1917.

PILES & HALVERSTADT,

Attorneys for Pltff.

[Indorsed]: Bond. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Oct. 10, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [342]

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*In the District Court of the United States for the Western District of Washington, Northern Division.*

No. 3310.

G. M. HARMON,

Plaintiff and Defendant in Error,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant and Plaintiff in Error.

**Order Directing Transmission of Original Exhibits  
to Appellate Court.**

This matter coming on for hearing on this the 6th day of November, 1917, upon motion of Kerr & McCord, attorneys for defendant and plaintiff in error, and it appearing to the Court that the parties hereto have agreed that it is impracticable to transcribe the exhibits on file herein, and the Court finding that it is impracticable to do so, it is ordered that Plaintiff's Exhibits 1 to 12, inclusive, and 15, and Defendant's Exhibits "A," "B," "C" and "D," the same being all of the exhibits on file herein, may be by the clerk of this court transmitted to the Circuit Court of Appeals for the Ninth Circuit, there to be inspected and considered, together with the transcript of record on appeal in this cause.

Done in open court this 6th day of November, 1917.

JEREMIAH NETERER,

Judge.

Due, legal and timely service of a copy of the foregoing Order is hereby acknowledged, and the consent of plaintiff and defendant in error to the entering of said order is hereby given.

PILES & HALVERSTADT,

Attorneys for Plaintiff and Defendant in Error.

[Indorsed]: Order to Transmit Exhibits. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Nov. 6, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [342A]

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*In the District Court of the United States for the  
Western District of Washington, Northern Division.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Order Extending Time for Transmission of Original  
Exhibits to Appellate Court.**

This matter coming on for hearing, and it appearing to the Court that the parties hereto have stipulated that the transcript of record in the above-entitled cause may be forwarded at this time to the Circuit Court of Appeals for the Ninth Circuit, without the exhibits and that the exhibits may thereafter

and within twenty days from date hereof be forwarded to the said clerk of the Circuit Court of Appeals, and it appearing that there is good cause for the extension hereinafter given, it is now by the Court;

ORDERED, that the time within which the exhibits on file herein may be forwarded to the Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby extended up to and including the 26th day of November, 1917.

IT IS FURTHER ORDERED, That the time within which the balance of the record may be forwarded to the said Circuit Court of Appeals be, and the same is hereby extended up to and including the 12th day of November, 1917.

Done in open court this 6th day of November, 1917.

JEREMIAH NETERER,

Judge.

O. K.—PILES & HALVERSTADT,

Attorneys for Plaintiff.

[Indorsed]: Order. Filed in the U. S. District Court, Western District of Washington, Northern Division. November 6, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [342B]



*In the District Court of the United States for the  
Western District of Washington, Northern Di-  
vision.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Stipulation Re Printing of Transcript of Record.**

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that the following-described documents on file herein, together with the exhibit transmitted separately, shall constitute the record on appeal, and that in preparing a transcript of said record the clerk of the above-entitled court need not include any other documents, except the following:

Complaint.

Summons.

Petition for Removal.

Bond on Removal.

Notice in Re Order to Remove Cause to District  
Court.

Affidavit of D. V. Halverstadt in Opposition to Re-  
moval.

Notice of Appearance Attorneys for Plaintiff.

Minutes in Re Plaintiff's Objections to Order Re-  
moval Overruled.

Order of Removal.

Order to Transmit Original Exhibits.

Answer.

Amended Reply.

Verdict.

Motion for Order Extending Time to File Bill of Exceptions.

Order Extending Time to File Bill of Exceptions.

Stipulation in Re Hearing Motion for Order Extending Time to File Bill of Exceptions.

Motion for Judgment *Non Obstante* and in the Alternative for a New Trial.

Receipt in Re Motion for Judgment *Non Obstante*, etc.

Decision of Court Denying Motion for New Trial.

Remission from Verdict.

Order Denying Motion for Judgment *Non Obstante Veredicto* for New Trial.

Judgment.

Order to Incorporate in Proposed Bill of Exceptions Proposed Amendments of Plaintiff.

Stipulation in Re Proposed Bill of Exceptions.

Order Settling and Certifying Bill of Exceptions.

Bill of Exceptions.

Petition for Writ of Error.

Assignment of Errors.

Order Allowing Writ of Error and Fixing Amount of Bond.

Bond.

Writ of Error.

Citation in Error. [343]

Dated at Seattle, Washington, this 25th day of October, 1917.

PILES & HALVERSTADT,  
Attorneys for Plaintiff.  
KERR & McCORD,  
Attorneys for Defendant.

We waive the provisions of the Act approved February 13, 1911, and direct that you forward typewritten transcript to the Circuit Court of Appeals for printing, as provided under Rule 105 of this court.

KERR & McCORD,  
J. N. IVEY,  
Attorneys for Plaintiff in Error.

[Indorsed]: Stipulation. Filed in the U. S. District Court, Western District of Washington, Northern Division. Oct. 25, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [344]

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*In the District Court of the United States for the  
Western District of Washington, Northern Di-  
vision.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Certificate of Clerk U. S. District Court to Transcript  
of Record.**

United States of America,  
Western District of Washington,—ss.

I, Frank L. Crosby, clerk of the United States District Court, for the Western District of Washington, do hereby certify that the foregoing 344 typewritten pages, numbered from 1 to 344, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as are necessary to the hearing of said cause on writ of error therein in the United States Circuit Court of Appeals for the Ninth Circuit, and as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on return to said writ of error herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [345]

Clerk's fee (Sec. R. S. U. S.), for making record, certificate or return, 813 folios at 15c.....	\$121.95
Certificate of Clerk to transcript of record, 4 folios at 15c.....	.60
Seal to said Certificate.....	.20
Certificate of Clerk to original exhibits, 3 folios at 15c.....	.45
Seal to said Certificate.....	.20
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Total.....	\$123.40

I hereby certify that the above cost for preparing and certifying record amounting to \$123.40 has been paid to me by attorneys for plaintiff in error.

I further certify that I hereto attach and herewith transmit the original writ of error and original citation issued in this cause.

IN WITNESS WHEREOF, I have hereto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 6th day of November, 1917.

[Seal]

FRANK L. CROSBY,  
Clerk U. S. District Court. [346]

*In the District Court of the United States, for the  
Western District of Washington, Northern Di-  
vision.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Writ of Error.**

The President of the United States to the Honorable,  
the Judge of the District Court for the West-  
ern District of Washington, Northern Division,  
GREETING:

Because in the record and proceedings and also in  
the rendition of the judgment upon a plea which is in  
the said court before you, or some of you, between  
G. M. Harmon, the plaintiff and the defendant in er-  
ror, and Northwest Auto Company, a corporation,  
defendant and plaintiff in error, manifest error hath  
happened, to the great prejudice of the said North-  
west Auto Company, a corporation, defendant and  
plaintiff in error, as by its complaint and assignment  
of errors appears;

We, being willing that error, if any there be,  
should be duly corrected and full and speedy justice  
done to the parties aforesaid, in this behalf do com-  
mand you, if judgment be therein given, that then,  
under your seal, distinctly and openly, you send the  
record and proceedings aforesaid, with all things

concerning the same, to the United States Circuit [347] Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, State of California, on the 8th day of November next, and within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this the 10th day of October, 1917.

[Seal]

FRANK L. CROSBY,

Clerk.

By Ed M. Lakin,

Deputy.

Clerk of the United States District Court for the Western District of Washington, Northern Division.

United States of America,

Western District of Washington,—ss.

We hereby acknowledge receipt of a true and correct copy of the foregoing Writ of Error and acknowledge service of said Writ of Error by the receipt of a copy thereof.

Oct. 10, 1917.

G. M. HARMON,

By PILES & HALVERSTADT,

Attorneys for Plaintiff. [348]

[Endorsed]: No. 3310. In the District Court of the United States for the Western District of Washington, Northern Division. G. M. Harmon, Plaintiff, vs. Northwest Auto Company, a Corporation, Defendant. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Oct. 10, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [349]

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*In the District Court of the United States, for the  
Western District of Washington, Northern Di-  
vision.*

No. 3310.

G. M. HARMON,

Plaintiff,

vs.

NORTHWEST AUTO COMPANY, a Corporation,  
Defendant.

**Citation in Error.**

The President of the United States to G. M. Harmon and Messrs. Pyles & Halverstadt, Her Attorneys:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the city of San Francisco within thirty days from the date of this writ, pursuant to a Writ of Error filed in the office of the clerk of the United States District Court of the Western District of Washington, Northern Division, sitting at Seattle, wherein you are the plaintiff and defendant in error, to show cause, if any



there be, why the judgment in said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this the 10th day of October, in the year of our Lord, 1917.

JEREMIAH NETERER,  
Judge. [350]

Attest my hand and the seal of the United States District Court for the Western District of Washington, Northern Division, at the clerk's office at Seattle, Washington, the day and year last above written.

[Seal] FRANK L. CROSBY,  
Clerk.  
By Ed. M. Lakin,  
Deputy.

Service of the foregoing Citation in Error acknowledged the 10 day of October, 1917.

PILES & HALVERSTADT,  
Attorneys for Plaintiff. [351]

[Endorsed]: No. 3310. In the District Court of the United States for the Western District of Washington, Northern Division. G. M. Harmon, Plaintiff, vs. Northwest Auto Company, a Corporation, Defendant. Citation in Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Oct. 10, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [352]

[Endorsed]: No. 3075. United States Circuit Court of Appeals for the Ninth Circuit. Northwest Auto Company, a Corporation, Plaintiff in Error, vs. G. M. Harmon, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed November 9, 1917.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

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*In the United States Circuit Court of Appeals for  
the Ninth Circuit.*

No. 3075.

NORTHWEST AUTO COMPANY, a Corporation,  
Plaintiff in Error,

vs.

G. M. HARMON,

Defendant in Error.

**Stipulation Excluding Original Exhibits from  
Printed Transcript of Record.**

IT IS HEREBY STIPULATED AND AGREED, by and between the parties hereto, that the printed record in the above-entitled cause need not include the exhibits, and that the said exhibits may be used in evidence to the same effect as though the same were printed in said record.

Dated this 13th day of November, 1917.

KERR & McCORD,  
Attorneys for Plaintiff in Error.  
PILES & HALVERSTADT,  
MILLER & LYSONS,  
Attorneys for Defendant in Error.

[Endorsed]: No. 3075. United States Circuit  
Court of Appeals for the Ninth Circuit. Northwest  
Auto Company, a Corporation, vs. G. M. Harmon.  
Stipulation Excluding Original Exhibits from  
Printed Transcript of Record. Filed Nov. 26, 1917.  
F. D. Monckton, Clerk.

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